

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 550

EARL MOORE, PETITIONER,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT**

PETITION FOR CERTIORARI FILED NOVEMBER 4, 1940.

CERTIORARI GRANTED DECEMBER 16, 1940.

BLANK PAGE

INDEX

PAGE

Caption	1
Proceedings in State Court:	
Declaration	1
Exhibit "A"—Schedule of Wages and Rules Governing Yardmen and Switchtenders, effective April 1, 1924	4
Exhibit "B"—Seniority List of Yard Men, Jack- son, Mississippi, November 13, 1926	18
Summons issued 9/15/36 and Sheriff's Return there- on (Omitted)	19
Interrogatories Propounded to Non-Resident De- fendant	20
Answers of Non-Resident Defendant to Interroga- tories	21
General Issue Plea of Defendant	22
Special Pleas Nos. 1 to 4 Inclusive of Defendant	23-28
Exhibit "A"—Letter, Earl Moore to J. F. Walker, dated 2/17/33	29
Special Plea No. 5 of Defendant	29
Exhibit "A"—Judgment in case Earl Moore vs. Yazoo & Miss. Valley Railroad Co., et al., Miss. State Court, No. 8232	34
Demurrer of pltf. to Special Pleas of Defendant	35
Demurrer of pltf. to Special Plea No. 6 of De- fendant	38
Special Plea No. 6 of Defendant	39

INDEX—Continued

	PAGE
Plaintiff's Replication to Defendant's Fifth Special Plea	40
Exhibit "A"—Declaration in case Earl Moore vs. Yazoo & Miss. Valley Railroad Co., Miss. State Court	42
Exhibit "B"—Opinion of the Court in case Earl Moore vs. Yazoo & Miss. Valley Railroad Co., Miss. State Court	47
Exhibit "C"—Opinion of Supreme Court of Miss. in case Earl Moore vs. Yazoo & Miss. Valley Railroad Company	48
Demurrer of defendant to Plaintiff's Replication to Deft. Fifth Special Plea	53
Judgment, entered 2/22/37	53
Appeal Bond	55
Agreement permitting pltf. to amend declaration by increasing demands of pltf. from \$3,000.00 to \$12,000.00, etc.	56
Notice of Removal (Omitted)	57
Petition for Removal (Omitted)	57
Bond for Removal (Omitted)	57
Order of Removal	57
Clerk's Certificate, State Court (Omitted)	58
Proceedings in U. S. District Court:	
Petition of defendant to withdraw Pleas and file Plea in Abatement	58
Defendant's Plea in Abatement	60
Plaintiff's Demurrer to Defendant's Plea in Abatement	63
Order permitting deft. to withdraw Pleas, allowing filing Plea in Abatement, sustaining demurrer to Plea in Abatement	64

INDEX—Continued

	PAGE
Special Pleas Nos. 1 to 4 inclusive of Defendant	65-70
Notation as to Exhibit "A"—Letter, Earl Moore to J. F. Walker, dated 2/17/33	71
Special Plea No. 5 of Defendant	71
Notation as to Exhibit "A"—Judgment in case Earl Moore vs. Yazoo & Miss. Valley Rail- road Co., et al., Miss. State Court, No. 8232	75
Special Plea No. 6 of Defendant	75
Special Plea No. 7 of Defendant	76
Demurrer of Plaintiffs to Special Pleas Nos. 1 to 4 in- clusive, of defendant	77
Plaintiff's Replication to Defendant's Fifth Special Plea	80
Notation as to Exhibit "A"—Declaration in case Earl Moore vs. Yazoo & Miss. Valley RR. Co., Miss. State Court	83
Notation as to Exhibit "B"—Opinion of the Court in case Earl Moore vs. Yazoo & Miss. Val- ley RR. Co., Miss. State Court	83
Notation as to Exhibit "C"—Opinion of Supreme Court of Miss. in case Earl Moore vs. Yazoo & Miss. Valley RR. Co.	83
Demurrer of plaintiff to Special Plea No. 6 of De- fendant	83
Demurrer of plaintiff to Special Plea No. 7 of De- fendant	84
Motion of Plaintiff for Judgment	85
Order sustaining demurrers pltf., demurrers to deft.'s 1st, 2nd, 3rd, 4th and 6th and 7th Special Pleas and overruling defendant's demurrer to Pltf.'s Replication to 5th Special Plea	86

INDEX—Continued

	PAGE
Opinion of the Court, dated 8/16/38	87
Opinion of the Court, dated 10/3/38	90
Amendment to Paragraph 6 of Declaration by Agree- ment with defendant	95
Exhibit "C"—Letter, J. F. Walker to Earl Moore, dated 2/15/33.	96
Motion of Pltf. to Amended Declaration	97
Order allowing Pltf. to Amend Declaration	97
Answer of Defendant to Declaration	98
TRANSCRIPT OF EVIDENCE	102
Case called for Trial, etc.	102
Evidence for Plaintiff:	
Testimony of Earl Moore	102
Exhibit "A"—Page 117 of the Supreme Court Record in the case of Earl Moore vs. I. C. RR. Co.	104
Notation relative to Exhibit "B"	106
Exhibit "C"—Page 155 of the Supreme Court record in case Earl Moore vs. I. C. RR. Co.	108
Notation relative to Exhibits in Proceed- ings in State Court case, etc.	109
Notation relative to Exhibit "E"—Being Letter J. F. Walker to Earl Moore, dated 2/15/33 (Same as Exhibit "C")	115
Exhibit "F"—Hearing given Mr. Earl Moore in Trainmaster's Office, Jackson, Miss., Feb. 20, '33, etc.	115

INDEX—Continued

PAGE

Transcript of Testimony—(Continued):

Evidence for Plaintiff—(Continued):

Testimony of Earl Moore—(Continued):

Exhibit "G"—Paragraph from Section 3
of the lease between the Y. &
M. V. and A. & F. Railroad Com-
pany 118

Exhibit "H"—Introduction of Illinois
Central RR. System of Transporta-
tion Rules 119

Exhibit "I"—Introduction of Answers to
Interrogatories propounded to the
RR. Co., etc. 120

Exhibit "J"—Statement of the earning
of H. H. Cutler employed as
Switchman by I. C. RR. Co., at
Jackson, Miss., Jan. 1, 1933 to Oct.
15, 1938 122

Exhibit Deft. #1—Letter, Earl Moore to
T. K. Williams, Trainmaster, dated
9/7/32 130

Exhibit (not marked)—Letter, J. F.
Walker, Supt., to Earl Moore,
dated 2/20/32 135

Testimony of A. E. McGhee 136

Motion of defendant to exclude evidence offered
by pltf. and for Judgment, Ruling Re-
served 140

Evidence for Defendant:

Testimony of T. K. Williams 141

G. G. Dowdall 153

F. A. Tyson 155

INDEX—Continued

PAGE

Transcript of Evidence—(Continued):

Evidence for Defendant—(Continued):

Testimony of F. A. Tyson—(Continued):

Exhibit Deft. "A"—Statement of Earnings of Earl Moore employed as Switchman by I. C. RR. Co., at Jackson, Miss., Nov. 11, 1926 to Dec. 31, 1932, Incl. 157

Notation as to Exhibit "B" being Statement of the earnings of H. H. Cutler, etc., (Same as Exhibit "J") .. 158

Exhibit "C"—Statement of earnings of H. H. Cutler, employed as Switchman by I. C. RR. Co., Jackson, Miss., Nov. 11, 1926 to Dec. 31, 1932, inc. 159

Testimony of T. S. Jackson 160

S. Hester 173

J. R. Foreman 176

C. E. Morphis 180

T. S. Jackson 184

L. E. Howard 184

Evidence for Plaintiff (In Rebuttal):

Testimony of E. A. Fleming 188

John Masters 190

J. A. Varnado 191

A. E. McGhee (Recalled) ... 195

Renewed Motion of defendant at the close of all the evidence for a directed verdict and ruling reserved 196

Motion of plaintiff at the close of all the evidence for a directed verdict and ruling reserved 196

INDEX—Continued

	PAGE
Opinion of the Court, dated 2/20/39	196
Judgment dated 3/7/39	200
Findings of Fact and Conclusions of Law	201
Motion of pltf. to set aside Judgment as to damages and Render	205
Order overruling motion of pltf. to set aside judg- ment and to re-assess damages and exception thereto	206
Notice of Appeal	206
Appeal Bond	207

Cross-Appeal Papers:

Notice on Cross-Appeal	208
Cross-Appeal Bond	209
Order extending time 40 days from 4/4/39 to file Record	210
Designation of Contents of Record on Appeal by both parties	211
Agreement of Counsel as to Parts of Record	213
Order extending time 30 days additional from 5/13/39 to file Record in C. C. A.	215
Clerk's Certificate	216
Proceedings in U. S. C. C. A., Fifth Circuit	217
Minute entry of argument and submission	217
Opinion, Sibley, J.	217
Dissenting opinion, Holmes, J.	227
Judgment	228
Petition for rehearing	230
Petition for rehearing	230
Order denying rehearing	236
Clerk's certificate	236
Order allowing certiorari	237

BLANK PAGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE JACKSON DIVISION OF THE SOUTHERN
DISTRICT OF MISSISSIPPI.

PLEAS AND PROCEEDINGS had and done at the regular term of the District Court of the United States for the Jackson Division of the Southern District of Mississippi, on November 10, 1938, that being the time and place fixed by law.

Present and Presiding, the Honorable S. C. Mize,
United States District Judge.

Among the proceedings had and done were the following, to-wit:

2. RECORD IN THE STATE COURT.

(Filed in the U. S. District Court March 21, 1938.)

In the Circuit Court of Hinds County, Mississippi.

EARL MOORE,

versus

No. 9378.

ILLINOIS CENTRAL RR. CO.

DECLARATION.

Now comes Earl Moore, plaintiff herein and a resident citizen of the First District of Hinds County, Mississippi, and complains of the Illinois Central Railroad Company, a corporation chartered, organized and existing under and by virtue of the Laws of the State of Illinois but doing business and having officers and agents within said district, county and state upon whom service may be had.

For that, whereas, on and for a long time prior thereto the 15th day of February, 1933, the said plaintiff was a member of a certain labor organization known as the brotherhood of Railroad Trainmen, which organization had a contract of employment with the said defendant providing for rules and rates of pay of trainmen employed by said defendant, a copy of said contract being hereto attached marked Exhibit "A" and prayed to be considered a part hereof as fully and completely as if copied herein, said contract was in effect between said organization and said defendant at all times mentioned herein.

That said plaintiff had been employed by said defendant as a trainman since on or about June 2nd, 1926.

3 That as a member of said organization said plaintiff was entitled to all of the benefits of said contract between said organization and said defendant.

That on the 13th day of November, 1936, in accordance with the provisions of said contract, the said defendant published its seniority roster for its Jackson yards and said plaintiff was assigned on said roster Number 52, a copy of said seniority roster being hereto attached marked Exhibit "B" and prayed to be considered a part hereof as fully and completely as if copied herein.

That among other things and as the main provision of said contract between said organization and said defendant, said contract provides for seniority of services; that is to say that any person holding a number should be entitled to work, if work was available, before any person holding a higher or succeeding number to such person and said plaintiff was entitled to work under said contract of employment whenever work was available for fifty-two men in the said Jackson yards, and said con-

tract provides, among other things, that no person should be fired or discharged without just cause.

That from the date that said plaintiff had entered the employment of said defendant as a trainman in the Jackson yards, the said plaintiff had rendered faithful and efficient services to said defendant and had been, and was, at all times mentioned herein, except when the said plaintiff was sick, ready, willing and able to comply with all rules, regulations and contracts of said defendant.

That on or about February 15th, 1933, and without cause, the said defendant did arbitrarily discharge from its employment said plaintiff, and, although said plaintiff has diligently sought employment since said time, he has been unable to obtain employment.

That under and by virtue of the provisions of said contract, the minimum pay per day was \$6.64 and if said plaintiff had not been discharged the said plaintiff would have worked a sufficient number of days as Number 52 on the original roster of November 13th, 1926, as amended by succeeding rosters, so that plaintiff would have earned the sum of \$12,000.00, but because of the breach of said contract of employment and the arbitrary discharge of said plaintiff by said defendants, as aforesaid, said plaintiff has earned nothing.

To the damage of said plaintiff in the sum of \$12,000.00, wherefore he brings this, his action, and demands judgment against said defendant in the sum of \$12,000.00, together with interest and costs.

CHALMERS POTTER,
Attorney for Plaintiff.

EXHIBIT "A".

Filed October 20, 1938.

Illinois Central Railroad Company.
Office of General Manager.

Schedule of Wages and Rules Governing Yardmen and
Switchtenders.

Effective April 1, 1924.

Article 1.

Rates of Pay.

	Per Day.	Overtime Per Hour.
A. Foremen	\$6.64	\$1.24½
Helpers	6.16	1.15½
Switchtenders	4.72	.88½

- B. Pilots will receive not less than Foreman's pay, rate to apply for the entire day's work.

Article 2.

Basic Day and Overtime.

- (A) Eight hours or less shall constitute a day's work.
- (B) Except when charging off where it is the practice to work alternately days and nights for certain periods, working through two shifts to change off; or where exercising seniority rights from one assignment to another; or when extra men are required by schedule rules to be used, all time worked in excess

of eight hours continuous service within a 24-hour period, shall be paid for as overtime, on the minute basis, at one and one-half times the hourly rate. This rule applies only to service paid on an hourly or daily basis and not to service paid on mileage or road basis.

Article 3.

Defining Yard Work.

(A) The switching, the transfer of freight and passenger equipment, the handling of all construction and maintenance of way trains operating exclusively within the switching limits, shall be considered yard work and be handled by yard men at not less than yard rates.

(B) Where regularly assigned to perform service within switching limits, yard men shall not be used in road service when road crews are available, except in case of emergency. When yard crews are used in road service under conditions just referred to, they shall be paid miles or hours, whichever is the greater, with a minimum of one hour, for the class of service performed, in addition to the regular yard pay and without any deduction therefrom for the time consumed in said service. This, however, not to affect practice of pushing trains, or the handling of miners' and other work now regarded as incidental to yard work at Kankakee, Evansville, Mounds, East St. Louis, Belleville, Duquoin, Herrin, Christopher, Benton, LaSalle, Amboy, Dixon, Rockford, Dubuque, Fort Dodge, Cherokee, Henderson, Grenada, Canton and Brookhaven.

Article 4.

Pay to Starting Point. Reporting and Not Used.
Assigned to Other Duties.

(A) Pay of yardmen shall continue until they return to the point at which they started to work.

Where hardships are caused by this rule in any yard or terminal, the Division Officers and Local Chairman shall negotiate an equitable rule to afford relief, subject to the approval of General Manager and General Chairman.

(B) Yardmen reporting for duty after being called, and not performing service, will be paid one day. This will not affect the present practice of requiring extra men to report morning and evening to find if work is available.

(C) Yardmen assigned to other than their regular duties will be paid the established rate for service performed, but in no case shall a yardman so assigned be paid less than on the basis of their regular rates.

Article 5.

8

Lunch Period.

(A) Yard crews will be allowed 20 minutes for lunch between 4½ and 6 hours after starting work, without deduction in pay.

(B) Yard crews will not be required to work longer than 6 hours without being allowed 20 minutes for lunch, with no deduction in pay or time therefor.

(C) Paragraphs (A) and (B) of this article apply to switchtenders, but switchtenders will be held responsible for their regular duties during the lunch period.

Article 6.

Starting Time.

(A) Regularly assigned yard crews will each have a fixed starting time and the starting time of a crew will not be changed without at least 48 hours' advance notice.

(B) Where three eight-hour shifts are worked in continuous service, the time for the first shift to begin work will be between 6:30 A. M. and 8:00 A. M.; the second shift, 2:30 P. M. and 4:00 P. M.; and the third shift, 10:30 P. M. and 12:00 midnight.

(C) Where two shifts are worked in continuous service the first shift may be started during any one of periods named in Section (B).

(D) Where two shifts are worked not in continuous service the time for the first shift to begin work will be between the hours of 6:30 A. M. and 10:00 A. M. and the second shift not later than 10:30 P. M.

9 (E) Where an independent assignment is worked regularly the starting time will be during one of the periods provided in Sections (B) or (D).

(F) At points where only one yard crew is regularly employed, they can be started at any time, subject to Section (A).

(G) Yardmen shall be assigned for a fixed period of time which shall be for the same hours daily for all regular members of the crew. So far as practicable, assignments shall be restricted to eight hours' work.

(H) The time for fixing the beginning of assignments or meal periods is to be calculated from the time fixed for the crew to begin work as a unit without regard to preparatory time or individual duties.

(I) Exceptions to the starting time rules may be agreed upon locally to cover local service requirements, subject to approval of General Manager and General Chairman.

Article 7.

Consist of Crew.

(A) A yard crew shall consist of not less than one foreman and two helpers, and yardmen will not be required to work with less than a full crew as specified above, except where a lesser number of men are now employed.

(B) In yards where three helpers are now employed on yard engines the practice will be continued and the number of men on crews will not be reduced except by agreement between the Company and the yardmen's committee.

10

Article 8.

Working Sixteen Hours.

Yardmen required to work sixteen hours will resume work when their rest period is up under the law and their pay will begin at their regular established starting time.

Article 9.

Vacancies.

When vacancies occur and senior yardmen are left unplaced through no fault of their own, they will receive pay for a minimum day.

Article 10.

Attending Court, Investigations, Etc.

(A) Yardmen or switchtenders attending Court or inquests under instructions from the Company will be al-

lowed the same compensation they would have earned had they remained on their regular assignment, with necessary expenses. Extra men so used will be allowed a minimum day, with necessary expenses. Money so earned shall be paid not later than the next regular pay-day.

11 (B) Yardmen or switchtenders, held to testify at inquests, make statements to Claim Agents, or give depositions on their own time at the instance of the Company will be paid for all time lost at regular rates. If no time is lost they will be paid for all time consumed at their regular hourly rates.

(C) Yardmen or switchtenders required to be present at investigations other than those in which they are concerned, will be paid for all time lost and necessary expenses.

(D) Yardmen or switchtenders required to attend re-examinations on rules and regulations will be afforded an opportunity to take same without loss of work.

Article 11.

Seniority.

(A) Seniority rights of yardmen will date from the time they enter service continuous in yard or terminal where employed.

(B) The right to preference of work and promotion will be governed by seniority in the service. The yardman oldest in the service will be given preference, if competent.

(C) In the appointment of Yardmasters and Assistant Yardmasters the senior yardman will in all cases, be given full and unprejudiced consideration.

(D) Rights contained in this agreement shall be understood to apply for both white and colored employes alike, and this plainly and necessarily involves only one seniority list in which all men will be treated uniformly, regardless of race or color.

12 (E) All men entering the service on and after January 16, 1920, to fill the positions of switchmen will be subject to and required to pass uniform examinations and comply with regulations as to standard watches and to know how to read and write.

(F) Discipline will be applied uniformly, commensurate with the facts in the case; without distinction as to color.

(G) When yard forces are reduced, the men involved will be displaced in the order of their seniority regardless of color.

(H) Seniority rights of switchtenders will date from the time they enter the service continuous in yards or terminal where employed.

(I) The right to preference of work will be governed by seniority in service. The switchtender oldest in service will be given preference providing the applicant is competent.

Article 12.

Seniority Lists and Bullétins.

(A) A correct seniority list of yardman and switchtenders shall be furnished Local Chairmen every ninety days, and a copy shall be posted in a convenient place in yard office to which yardmen and switchtenders shall have access at all times. A list shall also, each thirty

days, be given the Local Chairman showing all names removed from the seniority list and the reason for such removal.

- (B) A bulletin shall be kept in each yard office or convenient place upon which assigned crews, switch-
13 tenders and extra men shall be registered.

Article 13.

Employment.

(A) Application of yardmen and switchtenders for employment, if not satisfactory, will be rejected within thirty days after first service, or applicant will be considered accepted.

(B) All physical examinations of applicants shall be made without expense to the persons examined, unless he shall pass such examination and be continued in the service not less than thirty days. The entire fee for such examination shall not exceed one dollar. The applicant shall be notified within ten days of the result of his physical examination, and if not notified, he will be considered physically qualified.

Article 14.

Leaving Service—Leave of Absence.

(A) Yardmen or switchtenders leaving the service of the Company of their own accord forfeit all seniority rights and shall not be reinstated.

(B) Any yardman or switchtender leaving the employ of the Company, will, at his request, be given a letter by his Division or Terminal Superintendent stating his term of service and capacities in which employed.

(C) Yardmen or switchtenders will not be granted leave of absence for a longer period than ninety days, except in case of sickness of himself or member of his family, or when serving on the Committee.

Article 15.

Switchtenders Vacancies.

(A) In filling vacancies in positions of switchtenders, full consideration shall be given yardmen disabled in the service of the Company, whenever such injuries are not such as to unfit them for such duties. Disabled yardmen desiring to be considered in line for such position may file application with the proper officer of the Company.

(B) The Yardman so disabled or incapacitated will date his seniority as switchtender from the date when permanently disabled or incapacitated in the terminal where employed.

Article 16.

Time Slip Corrections.

(A) When for any reason the time claimed by time slip is not allowed, or if the time slips are not made out correctly, they will be promptly returned and the reason given therefor.

(B) Yardmen or switchtenders who are short eight hours or more in their pay will, upon request, be given a voucher for the amount.

15

Article 17.

Notary Fees.

When the Company requires that official papers shall be certified by a Notary Public, or other Court Officers, it shall pay the fee assessed by such officers.

Article 18.

Serving on Committee.

Any yardman or switchtender serving on the Committee shall not be discriminated against, and shall have leave of absence, upon request, to serve on such Committee.

Article 19.

Cabooses.

Yardmen will be furnished cabooses in transfer service, also on other extended runs justifying having cabooses. A yard crew shall be permitted to switch the caboose required by this rule to the rear end of the train before commencing a transfer or other extended movement. Cabooses will be equipped with stoves, tools, signal appliances, lamps, and such other supplies as are required for the service. Present practice of drawing supplies to continue.

Article 20.

Equipment of Engines.

- (A) All engines assigned to switching service shall be equipped with headlights, foot-boards and proper safety appliances at both ends,

16

(B) Engines that blow steam, so as to obstruct the observation of signals, shall not be used in yard service.

Article 21.

Chaining Cars, Etc.

(A) Yardmen will not be required to chain up or unchain cars, couple or uncouple hose in yards or on repair tracks where car men are on duty.

Note—Under this rule yardmen will, if necessary to avoid delay, couple or uncouple hose between engine and car.

(B) It will not be the duty of yardmen on work train to handle cables, sideboards, side doors, or to operate weed burners, rail loaders, lidgerwoods or spreaders.

Article 22.

Investigations.

(A) When objections or charges are made against any yardman or switchtender by other yardmen or switchtenders, they shall be put in writing and shall convey a full and clear statement of objections or charges.

(B) The proper officers of the Company will hear any reasonable complaint by an individual yardman or switchtender, or any complaint made by the authorized committee of the B. of R. T., representing same, provided due notice shall be given the Company in writing of the subject of complaint and a special appointment made as to the time and place same shall be considered.

(C) Yardmen or switchtenders continued in the service and not censured pending an investigation of an alleged offense shall be notified, within five days after the Company has information of the offense, that a charge is pending. Within five days thereafter an investigation shall be held, if demanded, and a decision shall be rendered within three days after the investigation.

(D) Yardmen or switchtenders taken out of the service or censured for cause, shall be notified by the Company of the reason therefor, and shall be given a hearing within five days after being taken out of service, if demanded, and if held longer shall be paid for all time so held at their regular rates of pay. Yardmen or switchtenders shall have the right to be present and to have an employee of their choice at hearings and investigations to hear the testimony, and ask questions which will bring out facts pertinent to the case. They shall also have the right to bring such witnesses as they desire to give testimony, and may appeal to higher officers of the Company in case the decision is unsatisfactory. Such decision shall be made known within three days at New Orleans and at other points ten days after the hearing, or yardmen or switchtenders shall be paid for all time lost after the expiration of three days at New Orleans and ten days at other points. In case the suspension or dismissal or censure is found to be unjust, yardmen or switchtenders shall be reinstated and paid for all time lost.

(E) Yardmen or switchtenders not at fault, required by the Company to be present at investigations as witnesses, shall be paid for all time lost.

18

Article 23.

Experienced Yardmen.

In the employment of yardmen, experienced men shall be given preference.

Article 24.

Grievances.

Any controversy arising as to the application of the rules herein agreed upon to the schedule between officers and yardmen and switchtenders shall be taken up by the Local Committee and the Local Officials. In the event of failure on their part to agree on a satisfactory basis of settlement, the committee representing the yardmen or switchtenders may take an appeal to the General Committee of the B. of R. T., who may appeal to the General Manager of the Company.

Article 25.

Local Agreements and Term of Agreement.

(A) Nothing in these rules shall be construed to abrogate any local rights the men may now have.

(b) The rules and rates shall remain in effect until December 31, 1925, and thereafter until revised or abrogated of which intention thirty days' written notice shall be given.

J. J. PELLEY,

19

General Manager.

Accepted for the Brotherhood of Railroad Trainmen:

T. S. JACKSON,

General Chairman,

F. W. STOCKWELL,

General Secretary.

(Above constitutes pages 32-41, inclusive, of Schedule of Rules and Rates of Pay for Trainmen, it being agreed by Counsel that these pages, together with pages 58 and

59 thereof, is all of said Exhibit that should be copied herein.)

Pages 58 and 59:

21 Record System of Discipline.

A reprimand or demerit will not be noted against an employe's record without written notice to him.

Not less than five demerits will be assessed, and in multiples of five, but in no case to exceed thirty demerits for ~~any~~ one offense.

Reprimands and demerits placed against the record of an employe will be canceled by satisfactory service for various periods as follows:

(a) A reprimand will be canceled by a clear record of three months.

(b) Five demerits will be canceled by a clear record of six months.

(c) Ten demerits will be canceled by a clear record of nine months.

(d) Thirty demerits will be canceled by a clear record of one year.

(e) Sixty demerits will be canceled by a clear record of eighteen months.

An accumulation of ninety (90) demerits will be taken as evidence that the employe is not rendering satisfactory service, and suspension from duty will follow, at which time the entire record will be reviewed and such further action taken as the circumstances warrant.

EXHIBIT "B".

Earl Moore,
vs.
Illinois Central Railroad Company.

Seniority List of Yard Men,
Jackson, Mississippi.

November 13, 1926.

1.	J. E. Masters	1/ 1/02
2.	W. C. Agnew	11/ 7/05
3.	Aaron Fields, Col.	1/ 8/06
4.	A. E. Flemming	16/15/06
5.	John Tobiac, Col.	12/ 1/06
6.	I. A. Thomson	2/ 6/09
7.	S. Hester	8/11/09
8.	S. U. Thompson, Col.	9/28/10
9.	Earl Peters, Col.	10/23/10
10.	Simon Sevens, Col.	2/12/12
11.	J. B. Johnson	5/12/12
12.	J. R. Cox	8/19/12
13.	M. Berbervich	9/13/12
14.	L. B. Hill	10/12/12
15.	O. P. Miller	11/25/12
16.	Dorsey Yucas, Col.	12/25/12
17.	Theodore Johnson, Col. ..	12/27/12
18.	J. R. Foreman	5/14/13
19.	S. P. Dow	11/26/13
20.	Will Lowe, Col.	8/18/14
21.	S. E. Doolittle	8/ 1/15
22.	John Reed, Col.	1/16/17
23.	R. E. Lee	1/21/17
24.	R. W. McElwee	4/23/17
25.	H. T. Burge	5/10/17
26.	J. G. Hampton	5/11/17

27.	J. A. Varnado	6/ 5/17
28.	R. N. Steele	6/24/17
29.	Bob Harvey, Col.	6/30/17
30.	S. Odom	7/ 4/17
31.	R. B. Moore	7/ 5/17
32.	L. S. Lee	7/11/17
33.	Floyd Gardner	7/17/17
34.	Arthur Mallet, Col.	8/ 1/17
35.	B. F. Hardy	8/27/22
36.	H. B. Hardy	9/12/22
37.	J. N. Cooper	9/13/22
38.	J. R. Stewart	9/23/22
39.	A. B. Conley	9/23/22
40.	E. L. Foreman	9/ 4/23
41.	J. E. Pierce	2/18/24
42.	J. M. Byrd	2/19/24
43.	C. E. Morphis	4/ 5/24
44.	Tom Neely	4/26/24
45.	E. M. Dees	8/14/24
46.	E. R. McMurthry	8/29/24
47.	R. A. Cochran	8/20/24
48.	Robert Newtin, Col.	8/20/24
49.	C. C. Curruth	8/25/24
50.	J. T. Fairchilds	9/ 1/24
51.	C. O. Stapleton	9/ 8/24
52.	Earl Moore	9/ 9/24
53.	H. H. Cutler	9/16/24

25

25-a Summons issued 9/15/36 and Sheriff's Return thereon, omitted from the printed record, pursuant to Rule 23 of this Court.

* * * * *

26

INTERROGATORIES PROPOUNDED TO NON-
RESIDENT DEFENDANT.

In the Circuit Court of the First District of Hinds County,
Mississippi.

Earl Moore, Plaintiff,

vs.

Illinois Central Railroad Company, Defendant.

To the Illinois Central Railroad Company, and May &
Byrd, its attorneys of record:

You are hereby notified that these interrogatories are
propounded to you under and by virtue of Section 1551
of the Code of 1930 which provides that a failure on your
part to answer said interrogatories within a reasonable
time that the penalty therefor is that your pleas shall be
stricken from the file and judgment by default rendered
against you.

Interrogatory No. 1. How many days has H. H. Cutler
worked as a trainman in your Jackson yard since February
15th, 1932?

Interrogatory No. 2. What has been the total compensa-
tion earned by said Cutler since February 15th, 1932, as
a switchman in your Jackson yards?

Interrogatory No. 3. If the plaintiff had continued in
your employment continuously from February 15th, 1932,
to the present time, would not said plaintiff have
27 been entitled to work the same number of days
and the same period of time that the said Cutler
worked?

CHALMERS POTTER,

Attorney for Plaintiff.

28 In the Circuit Court of the First Judicial District.

Earl Moore, Plaintiff,

vs.

No. 9378.

Illinois Central Railroad Company, Defendant.

State of Mississippi,
County of Hinds.

Now comes the defendant, the Illinois Central Railroad Company, and for answer to the interrogatories propounded to it by the plaintiff in the above entitled cause, says:

Interrogatory No. 1: How many days has H. H. Cutler worked as a trainman in your Jackson Yard since February 15, 1932?

Answer: 1012 days.

Interrogatory No. 2: What has been the total compensation earned by the said Cutler since February 15, '932, as a switchman in your Jackson yards?

Answer: \$6,672.23.

Interrogatory No. 3: If the plaintiff had continued in your employment continuously from February 15, 1932, to the present time, would not said plaintiff have been entitled to work the same number of days in the same period of time that the said Cutler worked?

Answer: Yes.

ILLINOIS CENTRAL RAIL-
ROAD COMPANY,

By MAY & BYRD,

Attorneys.

29 State of Tennessee,
County of Shelby.

Before me, the undersigned authority in and for the said County and State, this day appeared F. A. Tyser, who being by me first duly sworn, says on oath that he

is an employee of the Illinois Central Railroad Company in the office of its District Accountant in Memphis, Tennessee, and that as such employee he has full knowledge of the payroll and the time sheets of the Illinois Central Railroad Company pertaining to the operations of the Jackson, Mississippi, Yards of said railroad company, and that he knows that the said records are correct and that the answers to the above interrogatories correctly set forth the facts regarding the number of days worked in the Jackson, Mississippi, yards by H. H. Cutler, a switchman, from February 15, 1932, to September 15, 1936, inclusive, and the said answers also set forth correctly the total compensation paid to the said Cutler by the Illinois Central Railroad Company as a switchman in the Jackson, Mississippi, yards from February 15, 1932, to September 15, 1936, inclusive, and affiant further says that the answers to the foregoing interrogatories are true and correct.

F. A. TYCER.

Sworn to and subscribed before me, this the 25 day of January, 1937.

(Seal)

E. W. COLLINS,
Notary Public.

30

GENERAL ISSUE PLEA.

In the Circuit Court of the First District, Hinds County,
Mississippi.

Earl Moore,

vs.

No. 9378.

I. C. RR. Company.

Comes the defendant, Illinois Central Railroad Company,
by its attorneys, and for plea to the declaration exhibited

against it in the above styled cause, say that it is not guilty of the wrongs and injuries complained of in manner and form as plaintiff hath alleged, or in any manner or form, and of this it puts itself upon the Country.

MAY & BYRD,

Attorneys for Defendant.

31

SPECIAL PLEA No. 1.

In the Circuit Court of the First District.

Earl Moore,

vs.

No. 9378.

Illinois Central Railroad Co.

State of Mississippi,
County of Hinds.

Now comes the defendant, the Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration filed against it in the above styled cause, says actio non, because it says that never at any time did any contract for hire exist between it and the plaintiff, Earl Moore, for a definite period of time, but on the contrary, this defendant says that the hiring of the said Earl Moore was a hiring at will, the same being terminable at any time at the will and pleasure of either the said Earl Moore or this defendant. And this defendant says that it never at any time employed the said Earl Moore for any definite period of time, and the said Earl Moore never at any time agreed or bound himself to perform any service for this defendant for any definite period of time, and the said contract, being indefinite as to the period for which the plaintiff was hired, is and was terminable at will, and no cause of action accrued to the said plaintiff because of his having been discharged by this defendant.

And this the defendant stands ready to verify.

MAY & BYRD,

Attorneys for Defendant.

32

SPECIAL PLEA NUMBER 2.

In the Circuit Court of the First District.

Earl Moore,

vs.

No. 9378.

Illinois Central RR. Company.

State of Mississippi,
County of Hinds.

Now comes the defendant, the Illinois Central Railroad Company, by its attorneys, and for a further and special plea in this behalf, says actio non, because it says that the agreement between the Brotherhood of Railroad Trainmen and the Illinois Central Railroad Company, upon which the plaintiff bases his cause of action, is void and unenforceable because the same is unilateral, there being no agreement whatever on the part of the said plaintiff to perform any service whatever for this defendant, and this defendant says that said agreement was executed without any consideration therefor and as between the plaintiff and the defendant no independent consideration existed for the execution of said agreement, and no independent consideration moved from either of the parties to said agreement, and said contract was, therefore, without consideration and being unilateral in its terms is unenforceable by the plaintiff.

All of which the defendant stands ready to verify.

MAY & BYRD,

Attorneys for the defendant.

33

SPECIAL PLEA No. 3.

In the Circuit Court of the First District.

Earl Moore,

vs.

No. 9378.

Illinois Central Railroad Co.

State of Mississippi,
County of Hinds.

Now comes the defendant, the Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration exhibited against it in this cause, says actio non, because it says that under and by virtue of the terms of the agreement between the Brotherhood of Railroad Trainmen and the Illinois Central Railroad Company, which said agreement is the basis for the plaintiff's said suit, the said agreement is not a contract of hiring between the Illinois Central Railroad Company and the individual employees effected thereby, but is, as it is denominated, merely a schedule of wages and rules governing yardmen and switch-tenders, and by said agreement no switchman is employed for any specific period and no switchman agrees to perform any service for said railroad company, and no switchman agrees to perform any service for any specific time, and the said agreement, therefore, furnishes no basis for recovery by the plaintiff in this cause.

And this the defendant is ready to verify.

MAY & BYRD,

Attorneys for the defendant.

SPECIAL PLEA No. 4.

In the Circuit Court of the First District.

Earl Moore, Plaintiff,

vs.

No. 9378.

Illinois Central Railroad Company, Defendant.

State of Mississippi,
County of Hinds.

Now comes the defendant, the Illinois Central Railroad Company, by its attorneys; and for a further and special plea to the declaration exhibited against it in this cause, says actio non, because it says that the agreement between the Brotherhood of Railroad Trainmen and the Illinois Central Railroad Company, sued on in this behalf, Paragraph D of April 22 thereof provides as follows:

“(d) Yardmen or Switchtenders taken out of the service or censured for cause, shall be notified by the Company of the reason therefor, and shall be given a hearing within five days after being taken out of service, if demanded, and if held longer shall be paid for all time so held at their regular rates of pay. Yardmen or Switchtenders shall have the right to be present and to have an employee of their choice at hearing and investigations to hear the testimony, and ask questions which will bring out facts pertinent to the case. They shall also have the right to bring such witnesses as they desire to give testimony, and my appeal to higher officers of the Company in case the decision is unsatisfactory. Such decision shall

35 be made known within three days at New Orleans and at other points ten days after the hearing, or yardmen or switchtenders shall be paid for all time lost after the expiration of three days at New Orleans and ten days at other points. In case the suspension or dis-

missal or Censure is found to be unjust, yardmen or switch-tenders shall be reinstated and paid for all time lost."

And this defendant avers that on the 15th day of January, 1933, the said plaintiff, Earl Moore, was notified in writing by J. F. Walker, Superintendent of the Louisiana Division of the Illinois Central Railroad Company, that his services as an employee of the Illinois Central Railroad Company were no longer desired and that his employment was at an end effective on that date, and subsequent thereto, on, to-wit, February 17, 1933, the said Earl Moore acting within the terms of said agreement between the Brotherhood of Railroad Trainmen and the Illinois Central Railroad Company, Article 22 thereof addressed to Mr. J. F. Walker, Superintendent at McComb, Mississippi, a letter requesting a hearing before the said Walker, a copy of said Letter being hereto attached, marked Exhibit "A", and asked to be taken as a part hereof as fully and completely as if herein written, and defendant says that thereafter on, to-wit: February 18, 1933, the said Superintendent J. F. Walker by letter notified the said Earl Moore, Plaintiff, that an investigation in connection with his dismissal from the service on February 15, 1933, would be given to the said
 36 plaintiff, Moore on Monday, February 20, 1933, at 4:00 P. M. at the office of Trainmaster Williams in Jackson, Mississippi, and in addition thereto the said Earl Moore was personally notified of the date of said hearing.

And this defendant says that thereafter on, to-wit, February 20, 1933, at 4:00 P. M. the said Earl Moore accompanied by A. E. McGehee, a representative of his own choosing, appeared at the office of the said T. K. Williams, Trainmaster at Jackson, Mississippi, and was accorded a hearing on the question of his discharge.

That thereafter on, to-wit, the 20th day of February, 1933, the said Earl Moore gave written notice to the defendant the Illinois Central Railroad Company, that he desired to appeal from the ruling of the said J. F. Walker, Division Superintendent to the General Officers of the railroad company, this defendant, and that pursuant to said notice by the said Earl Moore, T. J. Quigley, General Superintendent of the Illinois Central Railroad Company for the Southern lines of the Illinois Central Railroad Company, being those lines owned and operates by said Company south of the Ohio River, the said Quigley being a general officer of the said Illinois Central Railroad Company and one having jurisdiction of said appeal, advised the said Earl Moore, plaintiff here, in writing on March 6, 1933, fixing Monday March 13, 1933, at 9:00 A. M. at his office in the City of New Orleans as the time and place where the said Earl Moore's appeal would

37 be heard, but this defendant says that the plaintiff, Earl Moore, failed and neglected to appear at said time, or to prosecute his said appeal, and has never to this day prosecuted said appeal but has in fact abandoned the same and the time for such appeal has long since past. And this defendant says that the said Earl Moore having set in motion the machinery provided by said contract for the settlement of the question of the rightfulness or wrongfulness of his discharge, and not having prosecuted his appeal, but having abandoned the same, is now estopped to question the decision of the officers of the Company in discharging him. And this defendant says that under the agreement sued on in this case the decision of the defendant, the Illinois Central Railroad Company, and its employees, which said decision was in good faith, is final and cannot be litigated or inquired into in this proceeding.

And all of this the defendant stands ready to verify.

MAY & BYRD,

Attorneys for the Defendant.

38

EXHIBIT "A".

(Copy.)

Jackson, Miss., February 17, 1933.

Mr. J. F. Walker,
McComb, Miss.

Dear Sir:

Under the contract of both Switchmen's Union of North America and the Brotherhood of Railroad Trainmen I desire to object to your discharging me which you did under date of February 15, 1933, and to apply for a hearing before you. I desire to have Mr. A. E. McGee to have this hearing. I also desire to know why I was discharged as I have a right to know under both of the above mentioned contracts as well as under the rules of your Company.

Please notify me of the time and place so I can be there.

Yours very truly,

(Signed)

EARL MOORE.

CP/W:

39

SPECIAL PLEA No. 5.

In the Circuit Court of the First District.

Earl Moore,

vs.

No. 9378.

Illinois Central Railroad Co.

State of Mississippi,
County of Hinds.

Now comes the defendant, the Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration exhibited against it in this cause,

says actio non, because it says that on the 15th day of October, 1932, the plaintiff, Earl Moore, filed a suit in the Circuit Court of the First District of Hinds County, Mississippi, the same appearing on docket No. 8232, against the Yazoo and Mississippi Valley Railroad Company. By his said suit the said plaintiff alleged among other things that by reason of his having been denied his proper place on the seniority roster promulgated by the said Yazoo and Mississippi Valley Railroad Company, and by reason thereof plaintiff alleged that he was in effect discharged by said railroad company and he claimed damages in the sum of \$20,000.00.

And thereafter, on the 23rd day of February, 1933, the said Earl Moore, plaintiff, filed his amended declaration against the Yazoo and Mississippi Valley Railroad Company and the Illinois Central Railroad Company alleging that by virtue of the fact that he had been given a lower place on the seniority roster of both of the defendants in their Jackson, Mississippi, yards he had in effect
 40 been discharged by said railroad companies, and that by reason of said erroneous place on said seniority roster and by reason of said discharge he had been damaged in the sum of \$20,000.00, and defendant says that the said amended declaration which was filed on the 23rd day of February, 1933, was after the said plaintiff, Earl Moore, was discharged on February 15th, 1933, and was after any right of action which the said Earl Moore might have had on account of said discharge had accrued.

And said amended declaration further alleged that there had been a breach of the contract of hiring existing between the plaintiff, Earl Moore, and the defendant, Illinois Central Railroad Company.

And thereafter, on, to-wit, the day of, 1933, this defendant, the Illinois Central Railroad Com-

pany, filed its special plea in said cause in the following form, to-wit:

"Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration herein, says that in any event the plaintiff is not entitled to recover pay for any time after the 15th day of February, 1933, because it says that on said 15th day of February, 1933, it notified the said plaintiff, Earl Moore, in writing that his services were no longer desired and that his employment was at an end and his said employment with this defendant did end on said date and any right the said Moore might have had to work for the defendant ceased on said date.

"All of which the defendant stands ready to verify."

41 And thereafter, on, to-wit, the 9th day of May, 1933, the plaintiff, Earl Moore, filed his replication to the said special plea of this defendant, the said replication being in the following form, to-wit:

"Replication to the Defendant, Illinois Central Railroad Company's Third Special Plea.

"And now comes the plaintiff and for replication to the third special plea of the Illinois Central Railroad Company, heretofore filed herein says that nothing therein contained should defeat or prevent the maintenance of the plaintiff's cause of action, because it is alleged in the declaration and in the exhibits annexed thereto, under Article 17 of said exhibit the following: 'No switchman will be discharged or suspended without just cause' and said special plea does not allege that the said defendant Illinois Central Railroad Company had any sufficient cause for firing the said plaintiff who was a switchman and the said plaintiff does hereby allege and aver that the only reason that he was fired was because he filed

this lawsuit seeking a redress of his wrongs in the defendants and plaintiff avers that the filing of a law suit to compel the Court to perform their contract is not sufficient cause within the meaning of said contract of employment.

"All of which the plaintiff is ready to verify."

And thereafter on October 1, 1935, issue was joined in short by consent to said replication of the plaintiff, Earl Moore, on said special plea.

And thereafter on, to-wit, Friday, October 4, 1935, said cause of action of the plaintiff, Earl Moore, was tried by the Circuit Court of the First Judicial District of Hinds County, Mississippi, on the amended declaration and the several pleas of the defendant, the Illinois Central Railroad Company, and on the several pleas of the defendant, the Yazoo and Mississippi Valley Railroad Company, including the special plea herein set out, and on replication to said special pleas and joinder of issue on each of said replications and testimony was adduced on the trial of said cause to support the issues, and particularly was testimony introduced on the question of the discharge of Earl Moore by the Illinois Central Railroad Company on the 15th day of February, 1933, the identical discharge which is the basis of the present law suit. And at the conclusion of the hearing judgment was rendered in favor of each of the defendants in said suit, that is to say, in favor of the Illinois Central Railroad Company and the Yazoo and Mississippi Valley Railroad Company, as shown by the judgment of this Court found at Minute Book #22, page 426 of the minutes of this Court.

And thereafter the said plaintiff, Earl Moore, appealed from said judgment of the Circuit Court of Hinds County to the Supreme Court of the State of Mississippi, on the 16th day of March, 1936, the said judgment of the Circuit

Court of the First District of Hinds County, Mississippi,
 43 rendered in said cause, was by said Supreme Court
 of Mississippi affirmed and said suit was finally
 terminated adversely to the plaintiff, Earl Moore.

That all of the foregoing pleas and proceedings herein
 referred to appear in the records of the Circuit Court of
 the First Judicial District of Hinds County, Mississippi, in
 cause No. 8232, Earl Moore vs. Yazoo and Mississippi
 Valley Railroad Co., et al, in the records and proceeding
 of the Supreme Court of Mississippi in case No. 32,063
 Moore v. Yazoo & M. V. R. Co., et al, reported in 166
 So. at page 395, reference to the pleas and proceedings in
 said Circuit Court and in said Supreme Court are prayed
 to be made as often as may be necessary on the trial of
 this cause.

And that this defendant says that by reason of the fore-
 going facts the judgment rendered by this Court in said
 cause No. 8232 Earl Moore v. Yazoo and Mississippi Valley
 Railroad Co. and Illinois Central Railroad Co., recorded
 in Minute Book 22, page 426 of the records of this Court,
 adjudicated all of the things sued for in this suit, and in
 which said suit the said plaintiff was the same as the
 plaintiff in the instant suit, and this defendant, the Illinois
 Central Railroad Co., was a defendant as in the instant
 suit, and the subject matter of the litigation was the same
 as the subject matter of the instant suit, and was in the
 same Court as is the instant case; a copy of which said
 judgment is hereto attached, marked Exhibit "A", and
 prayed to be taken as a part hereof. And this defendant
 says that this judgment is res adjudicata of all the matters
 and things sued for in this suit.

And this the defendant stands ready to verify.

MAY & BYRD,

Attorneys for Defendant.

EXHIBIT "A."

Copy.

In the Circuit Court of the First Judicial District of Hinds
County, Mississippi.

Seventeenth Day, Friday, October 4, 1935.

Earl Moore

vs.

8232.

Yazoo & Mississippi Valley Railroad Company, et al.

This day this cause came on to be heard and both plaintiff and defendants being present in person and by attorneys and announced ready for trial, and came a jury of good and lawful men, to-wit: D. G. Patton and eleven others, who after hearing all of the testimony in the case and receiving the instruction of the Court retired to consider the verdict and presently returned into open Court the following verdict:

"We, the jury, find for the defendants."

It is, therefore, considered and ordered by the Court that the plaintiff, Earl Moore, take nothing by reason of his suit in this behalf, and that the defendants, Yazoo and Mississippi Valley Railroad Company and the Illinois Central Railroad Company go hence without day.

It is further ordered that the plaintiff, Earl Moore, pay all costs in this behalf expended, for all of which let execution issue.

Minute Book No. 22, Page 426.

45

FIRST SPECIAL PLEA.

In the Circuit Court of the First Judicial District of Hinds
County, Mississippi.

Earl Moore, Plaintiff,
vs.

No. 9378.

Illinois Central Railroad Company, Defendant.

Now comes the plaintiff, Earl Moore, and demurs to the first special plea, heretofore filed by the defendant herein, and for cause of said demurrer assigns as follows:

First: That said special plea sets forth no defense to plaintiff's cause of action.

Second: That the contract sued on showed that it was not a contract terminable at will.

And for other causes to be assigned.

CHALMERS POTTER,
Attorney for Plaintiff.

46

DEMURRER TO SECOND SPECIAL PLEA.

In the Circuit Court of the First Judicial District of Hinds
County, Mississippi.

Earl Moore, Plaintiff,

vs.

No. 9378.

Illinois Central Railroad Company, Defendant.

And now comes the plaintiff, Earl Moore and demurs to the second special plea, heretofore filed by the defendant herein, and for cause of said demurrer assigns as follows:

First: That the said special plea sets forth no defense to plaintiff's cause of action.

Second: That the contract sued on shows on its face that it is a unilateral contract.

And for other causes.

CHALMERS POTTER,
Attorney for Plaintiff.

47 DEMURRER TO THIRD SPECIAL PLEA.

In the Circuit Court of the First Judicial District of Hinds County, Mississippi.

Earl Moore, Plaintiff,

vs.

No. 9378.

Illinois Central Railroad Company, Defendant.

Now comes the plaintiff, Earl Moore, and demurs to the Third Special Plea, heretofore filed by the defendant herein, and for cause of said demurrer assigns as follows:

First: That said special pleas sets forth no defense to plaintiffs cause of action.

Second: That said contract shows on its face that it is a contract between the Brotherhood of Railway Trainmen of which this plaintiff was a member and under which contract he worked, and the defendant.

And for other causes.

CHALMERS POTTER,
Attorney for Plaintiff.

48 DEMURRER TO FOURTH SPECIAL PLEA.

In the Circuit Court of the First Judicial District of Hinds
County, Mississippi.

Earl Moore, Plaintiff,

vs.

No. 9378.

Illinois Central Railroad Company, Defendant.

Now comes the plaintiff, Earl Moore, and demurs to the Fourth Special Plea, heretofore filed by the defendant herein, and for cause of said demurrer assigns as follows:

First: That said special plea sets forth no defense to plaintiffs cause of action.

Second: That paragraph "D" of article 22 of said contract, quoted in said Fourth Special Plea, does not make it mandatory upon the plaintiff to demand a hearing or take an appeal, but these are only additional and permissable rights granted him under the contract, and said contract nowhere prohibits his right to sue until and unless he has exhausted the rights of appeal.

Third: That the finding of the officers of said railroad are not binding because it is contrary to public policy to allow any man or person, natural or artificial, to be a judge of his own cause.

Fourth: That if said contract should be construed as to require that plaintiff demand a hearing and take or prosecutes an appeal that the said provisions relied upon in this Plea are then contrary to public policy in that they are an effort of the said parties to oust the Courts of the land of jurisdiction granted to them by the constitutional laws of the State of Mississippi.

And for other causes.

CHALMERS POTTER,
Attorney for Plaintiff.

49 DEMURRER TO SPECIAL PLEA SIXTH.

In the Circuit Court of the First Judicial District of Hinds
County, Mississippi.

Earl Moore, Plaintiff,

vs.

No. 9378.

Illinois Central Railroad Company, Defendant.

Now comes the plaintiff, Earl Moore, and demurs to the Sixth Special Plea, heretofore filed by the defendant herein, and for cause of said demurrer assigns as follows:

First: That said special plea sets forth no defense to plaintiff's cause of action.

Second: Because nowhere in said special Plea is there any denial of any fact set forth in plaintiff's declaration and that the declaration shows that the suit is based upon a written contract exhibited with the declaration and not upon a verbal contract and there is not denial of the execution of the contract sued on.

Third: That the allegations of said plea are not responsive to the issue united in plaintiff's declaration.

And for other causes.

CHALMERS POTTER,
Attorney for Plaintiff.

SPECIAL PLEA No. 6.

In the Circuit Court of the First District.

Earl Moore, Plaintiff,

vs.

No. 9378.

Illinois Central Railroad Company. Defendant.

State of Mississippi,
County of Hinds.

Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration exhibited against it in this cause, says actio non, because it says that there was never any written contract of employment between the plaintiff and this defendant, but that the contract of employment between plaintiff and this defendant was verbal and alleged breach of contract occurred on February 15, 1933, and on said date plaintiff's cause of action, if any he had, or has, arose on said date, and more than three years elapsed from the date of said alleged breach of contract and the date of the filing of this suit, and this defendant says that by reason thereof this said suit is barred by the statute of limitations of three years, as provided by section 2299 of the Mississippi Code of 1930.

And this the defendant is ready to verify.

MAY & BYRD,

Attorney for Defendant.

51 PLAINTIFF'S REPLICATION TO DEFEND-
 ANT'S SPECIAL PLEA.

In the Circuit Court of the First District of Hinds County,
 Mississippi.

Earl Moore

vs.

No. 9378.

Illinois Central Railroad Co.

And now comes Earl Moore, plaintiff, and for replication to the fifth special plea heretofore filed by the defendant herein, says that although it is true that on the 15th day of October, 1932, this plaintiff filed a suit in this Court, the same being numbered 8232, against the Yazoo & Mississippi Valley Railroad Company and plaintiff says that said declaration was also filed against this defendant, but that through inadvertence the Clerk of this Court neglected to issue process against this defendant but when this matter was called to the attention of the plaintiff therein process was immediately issued against said defendant upon the original declaration, a copy of said declaration being hereto attached marked Exhibit "A" and prayed to be considered a part hereof as fully and completely as if copied herein, but plaintiff denies that on the 23rd day of February, 1933, he filed an amended declaration against the Yazoo and Mississippi Valley Railroad Company and this defendant.

It was alleged in said declaration, in said suit No. 8232, and the following allegation constituted the gist of plaintiff's action therein, that the defendants therein had breached a contract between the Switchmen's Union of North America, of which plaintiff was, at the time
 52 he went to work for the Alabama & Vicksburg Railway Company, a member, in that he had been given a lower place on the seniority roster of both defend-

ants in their Jackson Yards than to the place to which he was entitled under the contract, yet, plaintiff avers that the basis of his cause of action in said cause, to-wit, No. 8232, was a breach of the contract originally entered into between the said Alabama & Vicksburg Railway Company and the Switchmen's Union of North America for a failure of this defendant and the Yazoo and Mississippi Valley Railroad Company to give him the place upon the seniority roster to which he was entitled, the contract between the Switchmen's Union of North America and the Alabama & Vicksburg Railway Company having been expressly assumed as alleged in the pleadings in said cause by the defendant therein, and all other matters alleged either in the declaration or in any subsequent pleading filed by either party thereto, did not form the basis of plaintiff's cause of action therein but went merely to show and explain the extent of damages suffered by said plaintiff, or an attempt by the defendants to limit said damages.

That the cause of action between the Illinois Central Railroad Company and this plaintiff in said cause No. 8232 is in no way identical with the cause of action here sued on because the cause of action here sued on is based not upon the Switchmen's Union contract but a contract between this defendant and the Brotherhood of Railway Trainmen. The basis of this suit is not a failure to give the plaintiff the place upon the seniority roster, to which he conceived he was entitled, but it is a suit for his wrongful discharge under a contract of hire.

53 Plaintiff further alleges that said plea constitutes no defense because cause No. 8232 was decided by this Court and affirmed by the Supreme Court upon the grounds that the contract therein sued on provided that within thirty days after the promulgation of the seniority list, the seniority list therein sued on

having been promulgated in November, 1928, that any person not being satisfied with the number given him thereon should, within thirty days after the promulgation of said list, file a written protest; that this the plaintiff, in cause No. 8232, failed to do personally within the time required by the contract between the Switchman's Union of North America and the Alabama and Vicksburg Railway Company, and for that reason a directed verdict was rendered against said plaintiff, which was affirmed by the Supreme Court of the State of Mississippi, a copy of the opinion of the Circuit Court and the opinion of the Supreme Court both being attached hereto marked Exhibits "B" and "C", respectfully, and prayed to be considered a part hereof as fully and completely as if copied herein, and the issue here involved has never been decided upon its merits either by this Court or any other Court.

All of which the plaintiff is ready to verify.

CHALMERS POTTER,
Attorney for Plaintiff.

54

EXHIBIT "A."

In the Circuit Court of the First District of Hinds County,
Mississippi.

Earl Moore

vs.

Yazoo & Mississippi Valley Railroad Company.

Declaration.

Now comes Earl Moore, plaintiff herein, a resident citizen of the First District of Hinds County, Mississippi, and complains of the Yazoo & Mississippi Valley Railroad

Company, a railroad corporation chartered, organized and existing under and by virtue of the laws of the State of Mississippi and whose principal place of business is in Jackson, Mississippi, and the Illinois Central Railroad Company is a corporation chartered, organized and existing under and by virtue of the State of Illinois, but with officers and agents in the First District of Hinds County, Mississippi, upon whom service of process may be had in an action of debt.

For that whereas on or prior to the time hereinafter mentioned the Illinois Central Railroad Company through stock ownership and a common set of directors and officers, owned, managed and controlled the Yazoo & Mississippi Valley Railroad Company in all of its corporate functions and affairs. That the officers of both defendants are the same, that they maintain joint passenger and freight offices and depots wherever they both operate. That defendants advertise and operate under the trade name of "Illinois Central System" and as a single
 55 system. That where both roads operate they maintain joint railroad yards and common switching facilities including the yards at Jackson and employ joint passenger and freight traveling agents and said corporation constitutes a common and joint enterprise and partnership.

That on the 2nd day of November, 1920, the plaintiff herein was engaged as a switchman by a certain railroad corporation whose corporation title was Alabama & Vicksburg Railway Company, and said plaintiff from said day, up until the time of the hereinafter mentioned lease, was continuously engaged by said Alabama Railway Company as such switchman.

That during said time last above mentioned, said plaintiff was a member of a labor union formed and organized

for the promotion of better hours of service, rates of pay and working conditions for its members, said union being known as the Switchmen's Union of North America, and while said plaintiff was a member of said organization and while said plaintiff was engaged as a switchman by the Alabama & Vicksburg Railway Company, as aforesaid, the Switchmen's Union of North America for and on behalf of its members, including said plaintiff, entered into a certain contract with said Alabama & Vicksburg Railway Company concerning the rates of pay, hours of service and working conditions of all switchmen working for said Railway Corporation, including said plaintiff, a copy of said contract being attached hereto, marked Exhibit "A" and prayed to be considered as a part hereof as fully and completely as if copied herein.

That thereafter and at a time when the said plaintiff was working as a switchman for said Alabama & Vicksburg Railway Company, and at a time when said
 56 contract, Exhibit "A" hereto, was in effect the Illinois Central Railroad Company, acting by and through the Yazoo and Mississippi Valley Railroad Company, leased the line of railroad of the said Alabama & Vicksburg Railway Company which ran across the State of Mississippi, its western termination at Vicksburg and the eastern termination at Meridian, Mississippi, and in the lease contract, among other things, it was agreed by the Yazoo & Mississippi Valley Railroad Company that it should be bound by all contracts then in effect with the said Alabama & Vicksburg Railway Company including the contract Exhibit "A" hereto, the pertinent parts of lease being hereto attached, marked Exhibit "B" and prayed to be considered a part hereof as fully and completely as if copied herein, but the entire contract is not copied to avoid prolixity, but same is found in the record in the Chancery Clerk's office at Jackson, Mississippi, in Deed Book 181, page 281, and made a part hereof as if copied herein.

That notwithstanding the contracts aforesaid whereby said plaintiff was entitled to seniority of service as a switchman from the date of entering employment of the Alabama & Vicksburg Railway Company, to-wit, November 2, 1920, which meant and now means, that he was entitled to work, should work be available, before any switchman entered the employment of either of the three railroads herein mentioned, after November 2, 1920, the said defendants on November 13, 1926, and at all times thereafter, deprived said plaintiff of his rights of seniority and on said last mentioned day and date did publish consolidate seniority list of all switchmen working in Jackson Yards and switching trains of the Illinois Central Railroad Company's including the line owned and operated by the Yazoo & Mississippi Valley Railroad Company, and lines formerly operated by said
 57 Alabama & Vicksburg Railway Company, and instead of giving to said plaintiff the seniority to which he was entitled on said list, which seniority would have made him Number 35 on the first consolidation roster issued and published by said defendants, they gave said plaintiff on said seniority list Number 52, and dated his seniority as beginning September 9, 1924, and all employment of the plaintiff since said date has been under said consolidated roster.

That under said contract, as aforesaid, said plaintiff was entitled to work whenever any work was available before any of the men listed on seniority board beginning with B. F. Hardy, Number 35, a copy of said seniority list being attached hereto marked Exhibit "C" and prayed to be considered a part hereof as fully and completely as if copied herein.

That notwithstanding said contract, aforesaid, said defendant has continuously and habitually worked men Numbered on Exhibit "C" from 35 to 51 inclusive at a

time when said plaintiff was entitled to work, and have not worked said plaintiff, thereby breaching his contract.

That immediately upon the publication of said Exhibit "C" the said plaintiff protested to the officers of the defendant, and has continued to protest from said date down to the present time, and said officials of said defendants habitually and continuously refuse to right the wrong theretofore done said plaintiff.

But for the violation of the breach of said contract by said defendants plaintiff would have worked and was entitled to work under said contract four hundred and fifty days when he was not allowed to work by 58 said defendants by reason of the breach of the contract aforesaid, but that they took away from his seniority rights, secured and guaranteed to him by said contracts aforesaid, the plaintiff is advised, believes and charges the fact to be that by reason of the falling off in the traffic throughout the nation, which decrease of traffic plaintiff alleges will be permanent, plaintiff was in effect discharged by said railroad company because there is no prospect of plaintiff being called to work under the seniority given him by said seniority list of November 13, 1926. That said plaintiff was at all times held himself ready at all times to work, and at all times has been ready, willing and able to do and perform all things required by him of said contract.

To the damage of the said plaintiff in the sum of \$20,000.00 wherefore he brings this his action and demands judgment against said defendant in the sum of \$20,000.00, together with interest and costs.

CHALMERS POTTER,
Attorney for Plaintiff.

EXHIBIT "B".

In the Circuit Court of Hinds County, Mississippi.

Earl Moore

vs.

No. 8232.

Y. & M. V. R. R. Co.

Opinion of the Court.

I am of the opinion that the Rape case does not apply here, for reason that we are dealing with a written contract between the Alabama & Vicksburg Railway Company and the Switchmen's Union of North America, in which there are mutual obligations.

It will not be necessary to decide whether the two defendants were acting as partners in respect of the matters complained of, since the motion for a directed verdict can be disposed of on other grounds.

I am of the opinion that the Switchmen's Union contract referred to was assumed by the Y. & M. V. R. R. Company. In taking this position I am to some extent adopting the theory of the plaintiff that the parties to said agreement by a long course of operation thereunder, and the use of seniority lists with reference thereto, effected a definite mutual understanding and 60 agreement. It is this same theory, on the other hand, which operates, in turn, to establish by the mutual functioning thereunder the consolidated seniority lists offered in evidence by the plaintiff as a binding working agreement between plaintiff and defendants.

The only loss sought to be proved by the plaintiff is based upon the assumption that plaintiff's proper number on the consolidated seniority list is that occupied by one Cooper, which is number 37. If plaintiff's number as shown on this list is proper, then there is no proof.

of loss occasioned to him. If the plaintiff has had the right to disarrange the numerical order of the names on this list, such right would belong to every other member thereon. This would lead to unreasonable confusion, and to the displacement of those of the plaintiff, and must no be allowed.

Plaintiff may not be permitted to repudiate the very list which he has introduced as an exhibit to his testimony.

I, therefore, see no reason or justification for disturbing the order of seniority as shown thereon and, under such view, the motion to exclude is sustained.

61

EXHIBIT "C".

Earl Moore

vs.

Yazoo & Mississippi Valley R. R. Co.

This is an action by the appellant against the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company for the alleged breach of a contract of employment. On motion of appellees, the appellant's evidence was excluded, and the jury was directed to return a verdict for them, which was accordingly done.

The facts disclosed by the record, out of which the appellant's claimed cause of action arises, are, in substance, as follows: Prior to June, 1926, the Alabama & Vicksburg Railway Company owned and operated a railroad, one of the termini of which was the city of Jackson, Mississippi, at which place it operated a switching yard. The appellant was employed by that company as a switchman in its Jackson yard; the relation between them being determined by a contract entered into with

the company by the Switchmen's Union of North America, of which the appellant was a member. This contract provided for seniority rights of the members of the union employed thereunder, which right of seniority determined the assignment of members of the union under the contract to work for the railroad company. In June, 1926, and thereafter the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company were both operating railroads running through the city of Jackson, at which place the switching for both roads was done by the Illinois Central Railroad Company under an arrangement

62 between them by which the Yazoo & Mississippi Valley Railroad Company paid the Illinois Central Railroad Company its proportionate part of the expenses incurred by it in doing this switching. In June, 1926, the Alabama & Vicksburg Railway Company leased its railroad to the Yazoo & Mississippi Valley Railroad Company. According to the appellant, this lease contract obligated the Yazoo & Mississippi Valley Railroad Company to assume and carry out the contract of the Switchmen's Union of North America with the Alabama & Vicksburg Railway Company, and the relation between the appellees, the evidence of which it will not be necessary to set forth, imposed a similar obligation on the Illinois Central Railroad Company.

It will not be necessary for us to determine whether or not this construction of the lease and of the relations between the appellees is correct, for, if it is, that fact would not effect the conclusion we have here reached.

This switching arrangement between the appellees was continued, and the Illinois Central received into its employment the switchmen, one of whom was the appellant, who had theretofore been working for the Alabama & Vicksburg Railway Company in its Jackson yard.

The Illinois Central Railroad Company on and prior to June, 1926, and thereafter, had a contract with the Brotherhood of Railroad Trainmen which provided for seniority rights of the member of the brotherhood somewhat similar to the seniority rights provided for the members of the Switchmen's Union of North America in the contract of that union with the Alabama & Vicksburg Railway Company. From June, 1926, to

63 November, 1926, the appellant seems to have been given his seniority right under the contract with the Alabama & Vicksburg Railway Company. In November, 1926, the Illinois Central, after a conference between its executive officers and those of the Brotherhood of Railroad Trainmen, adopted and published a new seniority roster effective in the city of Jackson, under which the appellant was given number 57, designating his seniority, when, according to the appellant, as we understand his contention, he should have been given the number 37, the result of which was that he thereafter failed to be called into service for a large number of days extending over the period of time from November, 1926, to October, 1932, when this suit was begun. This roster of November, 1926, came under the observation of the appellant when it was promulgated and he continued thereafter in the service of the Illinois Central Railroad Company without making any objection of the roster until a comparatively short time before this suit was filed in October, 1932.

Section 22 of the contract between the Switchmen's Union of North America and the Alabama & Vicksburg Railway Company provided, under the heading "Seniority Roster", that: That the general chairman and local chairman shall be furnished a copy of the seniority roster each six (6) months, and a copy shall be posted on the bulletin boards available to all switchmen concerned. Any protest as to the correctness of seniority

roster must be made in writing within thirty (30) days. There will be no interchange of seniority between different yards."

No copy of the seniority roster published in November, 1926, was given to either the general or local chairman, but the local chairman, McGehee, learned prior to its publication that a new roster would probably be adopted, and that a conference between the executives of the railroad and of the Brotherhood of Railroad Trainmen would be held for that purpose. He appeared at this conference but was denied admission thereto. He afterwards made verbal objection thereto, we will assume, to the proper railroad officers, and was informed that the railroad had no contract with the Switchmen's Union of North America. Sometime after the publication of this seniority roster, the exact date of which does not appear, the appellant joined the Brotherhood of Railroad Trainmen.

The record presents a number of questions which it will not be necessary for us to answer, for the one now to be set forth will determine the issue irrespective of the others. That question is this: Assuming for the purpose of the argument that the appellees were obligated to perform the contract of the Switchmen's Union of North America with the Alabama & Vicksburg Railway Company, and that this contract inured to the appellant's benefit, did the appellant waive his rights thereunder? Under this assumption if the appellant was given No. 57 on the roster of November, 1926, when he should have been given the number 37, the Switchmen's Union of North America contract was breached by the appellees when that roster was promulgated and acted on by the Illinois Central Railroad Company; but the breach of a contract of one party thereto can be waived by the other. Was this breach here waived by the ap-

pellant? When this roster came under the appellant's observation, instead of protesting and indicating to the appellees that he would claim his rights under that contract, he continued to work under the new seniority roster, and thereby elected to accept it and to work in accordance with its provisions. Had he made such a protest, the Illinois Central would have had an opportunity to revise the roster, if its obligation to
 65 the appellant so required, in doing which it would have necessarily displaced the seniority of other switchmen on the roster, to whom it was also under a similar contractual obligation. The effect of the promulgation of this November, 1926, seniority roster was to offer the appellant and the other switchmen affected thereby a new contract in so far as their relative seniority was concerned, and where the breach of a contract is followed by the offer of another as a substitute therefor, the acceptance thereof waives the breach of the former. By accepting work under the new roster without protest, the Illinois Central was justified in believing that the appellant would claim only thereunder, and that it could safely deal with its other switchmen on that assumption and accord to them their rights thereunder. This was the ground on which the Court below acted.

We have assumed that McGehee's protest injured to the benefit of the appellant; nevertheless that protest did not relieve the appellant of the effect of his subsequent acquiescence in the new seniority roster. *Y. & M. V. R. Co. vs. Sideboard*, 161 Miss. 4, 133 So. 669, is not in conflict herewith, for there the employee, though continuing to work, did so under protest, indicating at all times that he did *not agree to* the change which his employer sought to make in his status under the contract.

66 DEMURRER TO PLAINTIFF'S REPLICATION
TO DEFENDANT'S FIFTH SPECIAL PLEA.

In the Circuit Court of the First Judicial District of
Hinds County, Mississippi.

Earl Moore, Plaintiff,

vs.

No. 9378

Illinois Central Railroad Company, Defendant.

Now comes the defendant, Illinois Central Railroad Company by its attorneys, and demurs to plaintiff's replication to defendant's fifth special plea in this cause, and for grounds of demurrer says:

1. Said replication and exhibits thereto constitute no defense to the plea of res adjudicata.
2. For other causes to be assigned on the hearing of this demurrer.

Wherefore the defendant prays the judgment of the Court if it shall make further answer to said replication.

MAY & BYRD,

Attorneys for Defendants.

67 In the Circuit Court of the First Judicial District
of Hinds County, Mississippi.

Earl Moore

vs.

9378.

Illinois Central Railroad Company.

This day this cause came on to be heard upon the demurrers of the plaintiff to defendant's first, second, third, fourth special pleas, and the Court having heard and

considered said demurrers and being advised of its judgment doth adjudge that the said demurrers are not well taken and should be overruled; and the same are hereby overruled, and thereupon the plaintiff declined to plead further to said special pleas.

And there came on for hearing the demurrer of the plaintiff to defendant's sixth special plea, and the Court having heard and considered the same doth sustain said demurrer.

And likewise there came on for hearing the demurrer of the defendant, the Illinois Central Railroad Company, to the replication of the plaintiff to the defendant's fifth special plea, and the Court having heard and considered the same and being advised of its judgment doth sustain said demurrer to said replication, and thereupon the plaintiff declined to plead further to said special plea No. 5.

And it appearing to the Court that the plaintiff, Earl Moore, has declined to plead further to the special pleas hereinabove referred to, and it appearing further unto the Court that the said pleas constitute a good
 68 defense to said cause of action, it is Ordered and Adjudged that the said Earl Moore take nothing by reason of his said suit and that the defendant Illinois Central Railroad Company go hence without day.

The plaintiff, Earl Moore, excepted to the action of the Court in overruling said demurrers to special pleas Nos. 1, 2, 3 and 4, and to the sustaining of the demurrer to the replication to special plea No. 5, and the Illinois Central Railroad Company excepted to the Judgment of the Court sustaining the demurrer to defendant's sixth special plea.

It appearing that there are certain exhibits to the declaration in this cause, to-wit, the schedule of wages and rules governing yardmen and switchtenders, governing employees of the Illinois Central Railroad Company, and that there is an exhibit to plaintiff's replication to the defendant's fifth special plea, to-wit, the agreement between the Switchmen's Union of North America and the Alabama and Vicksburg Railway, and it further appearing that each of said documents is printed and that on an appeal to the Supreme Court the Court's convenience will be better served by sending the original of each of said exhibits, it is Ordered that in the event of an appeal each of the original exhibits above referred to be transmitted to the Supreme Court in lieu of copying the same in the transcript of the record.

It is further Ordered that the Plaintiff, Earl Moore, pay all costs in this behalf expended, for all of which let execution issue.

Minute Book No. 23, Page 85-6. Date, Feb. 22, 1937.

69

APPEAL BOND.

In the Circuit Court of the First Judicial District of
Hinds County, Mississippi.

Earl Moore, Plaintiff,

vs.

Illinois Central Railroad Company, Defendant.

Know All Men By These Presents: That we, Earl Moore, Principal, and Jone H. Williams and A. E. McGehee, sureties, are held and firmly bound unto the Illinois Central Railroad Company in the penal sum of \$500.00, for which payment well and truly to be made,

we hereby bind ourselves, our heirs, executors and administrators forever.

The condition of the foregoing bond is such that there has been lately rendered in this Court a judgment in favor of the principal obligee herein and against the principal obligor and said principal obligor being dissatisfied by said judgment has prayed for and obtained an appeal to the Supreme Court of the State of Mississippi.

Now therefore, if said principal obligor shall well and truly prosecute his cause of action with effect, or pay all costs that might be rendered against him on appeal, this obligation to be void otherwise to remain in full force and effect.

Witness our signatures this the 17 day of May, 1937.

EARL MOORE,

Principal.

JOE H. WILLIAMS,

Surety.

A. E. McGEHEE,

Surety.

Approved this the 19th day of May, 1937..

E. D. FONDREN,

Clerk,

By H. T. ASHFORD, JR., D. C.

70 In the Circuit Court of the First Judicial District
of Hinds County, Mississippi.

Earl Moore

vs.

9378.

I. C. R. R.

By agreement of the parties hereto it is hereby Ordered that the plaintiff be allowed to amend the declaration herein by increasing the demands of the plaintiff from

\$3,000.00 to \$12,000.00 and the defendant is allowed to file its petition and bond for the removal of this cause to the District Court for the Southern District of Mississippi, on this day.

Minute Book No. 23, Page 294, Date Feb. 21, 1938.

71 NOTICE OF REMOVAL omitted from the printed record, pursuant to Rule 23 of this Court.

* * * * *

PETITION FOR REMOVAL omitted from the printed record, pursuant to Rule 23 of this Court.

* * * * *

BOND FOR REMOVAL omitted from the printed record, pursuant to Rule 23 of this Court.

* * * * *

77 ORDER OF REMOVAL.

In the Circuit Court of the First Judicial District of
Hinds County, Mississippi.

Earl Moore.

vs.

9378.

Illinois Central Railroad Company.

The defendant, Illinois Central Railroad Company, by its attorneys, presented in open Court its petition for the removal of this cause from this Court to the District Court of the United States for the Southern District of Mississippi, and also a bond, with good and sufficient

Surety, in the penalty of two hundred and fifty dollars (\$250.00) conditioned as required by the Act of Congress in such cases made and provided; and this being at or before the time said defendant is required by the laws of the State of Mississippi or the rule of this Court, to answer or plead to the amended declaration or complaint of plaintiff in this suit, it is Ordered and Adjudged by the Court that said petition be filed; that said bond (which has been duly proven in open Court) be accepted; that this suit be removed from this Court to the District Court of the United States for the Southern District of Mississippi, at Jackson; that the Clerk of this Court forthwith transmit to that Court a full, true and perfect copy of the record in this suit, duly certified according to law; and that no further proceedings be had in this suit in this Court.

Minute Book No. 23, Page 295; Date, Feb'y. 10, 1938.

78 CLERK'S CERTIFICATE, MISS. STATE COURT, omitted from the printed record, pursuant to Rule 23 of this Court.

* * * * *

79 RECORD IN THE DISTRICT COURT.

#8086 Law.

Filed April 30, 1938.

In the District Court of the United States for the Jackson Division of the Southern District of Mississippi.

Earl Moore, Plaintiff,

vs.

No. 8086 Law.

Illinois Central Railroad Company, Defendant.

Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and with respect shows and

represents unto the Court that this cause originated in the Circuit Court of the First Judicial District of Hinds County, Mississippi, and was removed to this Court from said Circuit Court. That before the removal of said cause and before the same became removable the general issue plea and certain special pleas were filed in said Circuit Court.

That said special pleas have not been passed upon by this Honorable Court.

That this petitioner now desires to withdraw the general issue plea and special pleas numbers 1, 2, 3, 4, 5 and 6 which were filed in said Circuit Court and to be permitted to file in this cause a plea in abatement and it tenders with this motion for filing, in the event the same is permitted by this Court, its special plea in abatement.

80 That your movant believes that by the filing of said plea in abatement the controversy may be concluded without either party incurring large expense, which would be done in the event said plea in abatement is not sustained.

Wherefore, defendant prays permission of this Court to withdraw said special pleas numbers 1, 2, 3, 4, 5 and 6 and the general issue plea and that it be permitted to file its plea in abatement in this cause.

Respectfully submitted,

MAY & BYRD,

Attorneys for Defendant.

Filed April 30, 1938.

(Title Omitted.).

Now comes the defendant, Illinois Central Railroad Company; by its attorneys, and for plea to the declaration exhibited against it in this behalf says that it is now and was at all times mentioned in said declaration a common carrier railroad, engaged in interstate commerce, its line of railroad extending from Chicago in the State of Illinois through the State of Mississippi, and other States of the United States, to New Orleans in the State of Louisiana, and the said Illinois Central Railroad Company as an interstate common carrier railroad was at all times mentioned in said declaration and is now subject to all the provisions of the Acts of Congress of the United States of America pertaining to railroads, and that both the defendant, an interstate common carrier railroad, and the defendant, who was employed by it as a switchman, were and are subject to the terms and provisions of the Act of the Congress of the United States of May 20, 1926, as amended June 21, 1934, found in United States Code Annotated, Title 45, Sections 151 et seq.

That the plaintiff's cause of action against this defendant is based upon an alleged breach of a contract designated as a schedule of wages, rules and working conditions, entered into by and between the Illinois Central Railroad Company and the Brotherhood of Railroad Trainmen, to the benefits of which under said contract the plaintiff, Earl Moore, claims to be entitled. That this litigation arose out of a dispute between the plaintiff, Earl Moore, a switchman, as an employee, and this defendant, a carrier engaged in interstate commerce, as to the proper interpretation and enforcement of said agreement between the said Illinois

Central Railroad Company and the Brotherhood of Railroad Trainmen as to whether or not the plaintiff, Earl Moore, was rightfully or wrongfully discharged from the services of the Illinois Central Railroad Company. That the said dispute was pending unadjusted on June 21, 1934. That the contract sued on by the plaintiff in this cause provides in paragraph D of Article 22 as follows:

“(d) Yardmen or Switchtenders taken out of the service or censured for cause, shall be notified by the Company of the reason therefor, and shall be given a hearing within five days after being taken out of service, if demanded, and if held longer shall be paid for all time so held at their regular rates of pay. Yardmen or Switchtenders shall have the right to be present and to have an employee of their choice at hearing and investigations to hear the testimony, and ask questions which will bring out facts pertinent to the case. They shall also have the right to bring such witnesses as they desire to give testimony, and may appeal to higher officers of the Company in case the decision is unsatisfactory. Such decision shall be made known within three days at New Orleans and at other points ten days after the hearing, or yardmen or switchtenders shall be paid for all time lost after the expiration of three days at New Orleans and ten days at other points. In case the suspension or dismissal or censure is found to be unjust, yardmen or switchtenders shall be reinstated and paid for all time lost.”

That the said plaintiff, Earl Moore, after his alleged discharge requested a hearing by his immediate superior, J. F. Walker, Superintendent, from the Louisiana Division of the Illinois Central Railroad Company, and he was accorded such hearing, and at such hearing the said Moore was fully informed of his discharge and the reasons therefor, and the said Moore feeling aggrieved at said

discharge undertook to appeal and did appeal to the defendant's General Superintendent at New Orleans, Louisiana, and the said General Superintendent fixed a date for the hearing of said appeal by the said Moore, but the said Moore failed, refused and declined to attend any hearing on said appeal and abandoned the same. And the said Moore never at any time from the time of his discharge up to this date has appealed to any general officer of the company, and has never requested any decision upon the rightfulness of his discharge from the said General Superintendent of Southern Lines at New Orleans, Louisiana, the general manager, any vice-president or president of the Illinois Central Railroad Company; that the said dispute has not been referred by petition or otherwise by the plaintiff or by the Brotherhood of Railroad Trainmen to the First Division of the National Railroad Adjustment Board, nor has said division of said board made an award thereon. And the said Earl Moore has failed to pursue the remedy set up in said Act of Congress of the United States, Title 45, Section 153, United States Code Annotated, which said remedy is exclusive.

84 Wherefore, this defendant says that this suit has been prematurely brought and the said suit should, therefore, be abated.

And all of this the defendant stands ready to verify.

MAY & BYRD,

Attorneys for Defendant.

State of Mississippi,
County of Hinds.

Before me, the undersigned authority in and for said County and State, this day personally appeared J. L. Byrd, who being by me first duly sworn, says on oath that he is one of the attorneys for the defendant in the

above styled cause and that the matters of fact stated in the foregoing plea in abatement are true and correct as therein stated.

J. L. BYRD.

Sworn to and subscribed before me, this the 30th day of April, 1938.

LESSIE B. KELLOGG,
Notary Public.

(Seal)

My Commission expires June 26, 1941.

85 PLAINTIFF'S DEMURRER TO DEFENDANT'S
PLEA IN ABATEMENT.

Filed June 3, 1938.

(Title Omitted.)

And now comes the plaintiff herein and demurs to the defendant's plea in abatement to plaintiff's declaration, and for cause of demurrer assigns as follows:

1. That said plea states no facts upon which to abate this action.
2. That under the Railroad Labor Act of 1926, in effect at the time this cause of action arose, the parties must contract to arbitrate before the Labor Board and no such contract is alleged or exhibited.
3. That the Act of Congress relied upon does not require an appeal to the Board, or Boards, therein mentioned, but only sets up a Board to act as arbitrators to which either of the parties may resort.

4. That the facts set forth in said plea show on their face that it would be against public policy to require the parties upon a present money demand to forego an immediate right to resort to the Courts.

86

5. That the contract relied upon in said plea does not require an appeal to the higher officers of the company, but merely gives the plaintiff the right, to be exercised or not at his option, to so appeal, all without a loss of his right to immediately resort to the Courts of the land for redress.

6. There was no case pending at the time of the filing of this suit.

7. That defendant waived the right to file a plea in abatement by filing pleas in bar and going to trial on the merits of this case in the State Court.

8. And for other causes.

CHALMERS POTTER,
Attorney for Plaintiff.

87

(Title Omitted.)

This cause coming on to be heard this day on the motion of the defendant to be permitted to withdraw the general issue plea and pleas numbered 1, 2, 3, 4, 5 and 6, and to be permitted to file in this cause a plea in abatement, and the Court having heard and considered the same, doth sustain said motion and it is Ordered that the defendant be, and it is hereby permitted to withdraw said pleas above numbered and to file its plea in abatement, to which action of the Court the plaintiff excepted and said exception is allowed, it being under-

stood that plaintiff does not waive his right to object to the filing of said plea because of laches or waiver of the defendant of its right to plead in abatement at this time.

And thereupon came on for hearing the demurrer of the plaintiff to said plea in abatement and the Court having heard and considered the same doth sustain said demurrer. To which action of the Court the defendant excepted and said exception is allowed.

And thereupon, on motion of defendant, it is hereby granted fifteen days within which to file further pleas to the declaration in this cause.

Filed June 3, 1938. M. B. 13, p. 821.

88

SPECIAL PLEA No. 1.

Filed June 15, 1938.

(Title Omitted.)

Now comes the defendant, the Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration filed against it in the above styled cause, says actio non, because it says that never at any time did any contract for hire exist between it and the plaintiff, Earl Moore, for a definite period of time, but on the contrary, this defendant says that the hiring of the said Earl Moore was a hiring at will, the same being terminable at any time at the will and pleasure of either the said Earl Moore or this defendant. And this defendant says that it never at any time employed the said Earl Moore for any definite period of

time, and the said Earl Moore never at any time agreed or bound himself to perform any service for this defendant for any definite period of time, and the said contract being indefinite as to the period for which the plaintiff was hired, is and was terminable at will, and no cause of action accrued to the said plaintiff because of his having been discharged by this defendant.

And this the defendant stands ready to verily.

MAY & BYRD,

Attorneys for Defendant.

89

SPECIAL PLEA No. 2.

Filed June 15, 1938.

(Title Omitted.)

Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and for a further and special plea in this behalf, says actio non, because it says that the agreement between the Brotherhood of Railroad Trainmen and the Illinois Central Railroad Company, upon which the plaintiff bases his cause of action, is void and unenforceable because the same is unilateral, there being no agreement whatever on the part of the said plaintiff to perform any service whatever for this defendant, and this defendant says that said agreement was executed without any consideration therefor and as between the plaintiff and the defendant no independent consideration existed for the execution of said agreement, and no independent consideration moved from either of the parties to said agreement, and said contract was, therefore, without consideration and being unilateral in its terms is unenforceable by the plaintiff.

All of which the defendant stands ready to verify.

MAY & BYRD,

Attorneys for Defendant.

90

SPECIAL PLEA No. 3.

Filed June 15, 1938.

(Title Omitted.)

Now comes the defendant, the Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration exhibited against it in this cause, says actio non, because it says that under and by virtue of the terms of the agreement between the Brotherhood of Railroad Trainmen and the Illinois Central Railroad Company, which said agreement is the basis for the plaintiff's said suit, the said agreement is not a contract of hiring between the Illinois Central Railroad Company and the individual employees affected thereby, but is, as it is denominated, merely a schedule of wages and rules governing yardmen and switch-tenders, and by said agreement no switchman is employed for any specific period and no switchman agrees to perform any service for said railroad company, and no switchman agrees to perform any service for any specific time, and the said agreement, therefore, furnishes no basis for recovery by the plaintiff in this cause.

And this the defendant is ready to verify.

MAY & BYRD,

Attorneys for Defendant.

Filed June 15, 1938.

(Title Omitted.)

Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration exhibited against it in this cause, says actio non, because it says that the agreement between the Brotherhood of Railroad Trainmen and the Illinois Central Railroad Company, sued on in this behalf, Paragraph D of Article 22 thereof provides as follows:

“(d) Yardmen or Switchtenders taken out of the service or censured for cause, shall be notified by the Company of the reason therefor, and shall be given a hearing within five days after being taken out of service, if demanded, and if held longer shall be paid for all time so held at their regular rates of pay. Yardmen or Switchtenders shall have the right to be present and to have an employee of their choice at hearing and investigations to hear the testimony, and ask questions which will bring out facts pertinent to the case. They shall also have the right to bring such witnesses as they desire to give testimony, and may appeal to higher officers of the Company in case the decision is unsatisfactory. Such decision shall be made known within three days at New Orleans and at other points ten days after the hearing, or yardmen or switchtenders shall be paid for all time lost after the expiration of three days at New Orleans and ten days at other points. In case the suspension or dismissal or censure is found to be unjust, yardmen or switchtenders shall be reinstated and paid for all time lost.”

And this defendant avers that on the 15th day of January, 1933, the said plaintiff, Earl Moore, was notified in writing by J. F. Walker, Superintendent of the Louisiana Division of the Illinois Central Railroad Company, that his services as an employee of the Illinois Central Railroad Company were no longer desired and that his employment was at an end effective on that date, and subsequent thereto, on, to-wit, February 17, 1933, the said Earl Moore acting within the terms of said agreement between the Brotherhood of Railroad Trainmen and the Illinois Central Railroad Company, Article 22 thereof addressed to Mr. J. F. Walker, Superintendent at McComb, Mississippi, a letter requesting a hearing before the said Walker, a copy of said letter being hereto attached, marked Exhibit "A", and asked to be taken as a part hereof as fully and completely as if herein written, and defendant says that thereafter on, to-wit, February 18, 1933, the said Superintendent J. F. Walker by letter notified the said Earl Moore, plaintiff, that an investigation in connection with his dismissal from the service on February 15, 1933, would be given to the said plaintiff, Moore, on Monday, February 20, 1933, at 4:00 P. M., at the office of Trainmaster Williams in Jackson, Mississippi, and in addition thereto the said Earl Moore was personally notified of the date of said hearing.

And this defendant says that thereafter on, to-wit, February 20, 1933, at 4:00 P. M., the said Earl Moore accompanied by A. E. McGehee, a representative of his own choosing, appeared at the office of the said T. K. Williams, Trainmaster at Jackson, Mississippi, and was accorded a hearing on the question of his discharge.

That thereafter on, to-wit, the 20th day of February, 1933, the said Earl Moore gave written notice to the defendant, the Illinois Central Railroad Company, that

he desired to appeal from the ruling of the said J. F. Walker, Division Superintendent, to the General Officers of the railroad company, this defendant, and that pursuant to said notice by the said Earl Moore, T. J. Quigley, General Superintendent of the Illinois Central Railroad Company for the southern lines of the Illinois Central Railroad Company, being those lines owned and operated by said company south of the Ohio River, the said Quigley being a general officer of the said Illinois Central Railroad Company and one having jurisdiction of said appeal, advised the said Earl Moore, plaintiff here, in writing on March 6, 1933, fixing Monday, March 13, 1933, at 9:00 A. M., at his office in the City of New Orleans as the time and place where the said Earl Moore's appeal would be heard, but this defendant says that the plaintiff, Earl Moore, failed and neglected to appear at said time, or to prosecute his said appeal, and has never to this day prosecuted said appeal but has in fact abandoned the same and the time for such appeal has long since past. And this defendant says

94 that the said Earl Moore having set in motion the machinery provided by said contract for the settlement of the question of the rightfulness or wrongfulness of his discharge, and not having prosecuted his appeal, but having abandoned the same, is not estopped to question the decision of the officers of the company in discharging him. And this defendant says that under the agreement sued on in this case the decision of the defendant, the Illinois Central Railroad Company, and its employees, which said decision was in good faith, is final and cannot be litigated or inquired into in this proceeding.

And all of this the defendant stands ready to verify.

MAY & BYRD,

Attorneys for Defendant.

Attached thereto is EXHIBIT "A", which is the same as Exhibit "A" to Special Plea No. 4; which has heretofore been copied at page 29 hereof.

95

SPECIAL PLEA No. 5.

Filed June 15, 1938.

(Title Omitted.)

Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration exhibited against it in this cause, says actio non, because it says that on the 15th day of October, 1932, the plaintiff Earl Moore filed a suit in the Circuit Court of the First District of Hinds County, Mississippi, the same appearing on the docket of said Court as No. 8232, being against the Yazoo and Mississippi Valley Railroad Company. By his said suit the said plaintiff alleged, among other things, that by reason of his having been denied his proper place on the seniority roster promulgated by the said Yazoo and Mississippi Valley Railroad Company plaintiff was in effect discharged by said railroad company and he claimed damages in the sum of \$20,000.00.

And thereafter on the 23rd day of February, 1933, the said Earl Moore filed his amended declaration against the Yazoo and Mississippi Valley Railroad Company and this defendant, the Illinois Central Railroad Company in said same cause of action or suit, alleging that by virtue of the fact that he had been given a lower place on the seniority roster of both the defendants in their Jackson, Mississippi, yards he had in effect been discharged by said railroad com-

96

panies, and that by reason of said erroneous place on said seniority rosters and by reason of said discharge he had been damaged in the sum of \$20,000.00. Defendant says that the said amended declaration which was filed on the 23rd day of February, 1933, was after the said plaintiff, Earl Moore, was discharged on February 15, 1933, and was after the date on which any right of action which the said Earl Moore might have had on account of said discharge had accrued.

And said amended declaration further alleged that there had been a breach of contract of hiring existing between the plaintiff, Earl Moore, and the defendant, Illinois Central Railroad Company.

And thereafter, on to-wit, the day, 1933, this defendant, the Illinois Central Railroad Company, filed its special plea in said cause in the following form, to-wit:

"Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration herein, says that in any event the plaintiff is not entitled to recover pay for any time after the 15th day of February, 1933, because it says that on said 15th day of February, 1933, it notified the said plaintiff, Earl Moore, in writing that his
97 services were no longer desired and that his employment was at an end and his said employment with this defendant did end on said date and any right the said Moore might have had to work for the defendant ceased on said date.

"All of which the defendant stands ready to verify."

And thereafter on, to-wit, the 9th day of May, 1933, the plaintiff, Earl Moore, filed his replication to the said

special plea of this defendant, the said replication being in the following form, to-wit:

"Replication to the Defendant, Illinois Central Railroad Company's Third Special Plea.

"And now comes the plaintiff and for replication to the third special plea of the Illinois Central Railroad Company, heretofore filed herein says that nothing therein contained should defeat or prevent the maintenance of the plaintiff's cause of action, because it is alleged in the declaration and in the exhibits annexed thereto, under Article 17 of said exhibit the following: 'No switchman will be discharged or suspended without just cause' and said special plea does not allege that the said defendant Illinois Central Railroad Company had any sufficient cause for firing the said plaintiff who was a switchman and the said plaintiff does hereby allege and aver that the only reason that he was fired was because he filed this lawsuit seeking a redress of his wrongs in the defendants and plaintiff avers that the filing of a law suit to compel the Court to perform their contract is not sufficient cause within the meaning of said contract of employment.

"All of which the plaintiff is ready to verify."

98 And thereafter on October 1, 1935, issue was joined in short by consent to said replication of the plaintiff, Earl Moore, on said special plea.

And thereafter on, to-wit, Friday, October 4, 1935, said cause of action of the plaintiff, Earl Moore, was tried by the Circuit Court of the First Judicial District of Hinds County, Mississippi, on the amended declaration and the several pleas of the defendant, the Illinois Central Railroad Company, and on the several pleas of the de-

fendant, the Yazoo and Mississippi Valley Railroad Company, including the special plea herein set out, and on replication to said special pleas and joinder of issue on each of said replications and testimony was adduced on the trial of said cause to support the issues, and particularly was testimony introduced on the question of the discharge of Earl Moore by the Illinois Central Railroad Company on the 15th day of February, 1933, the identical discharge which is the basis of the present law suit. And at the conclusion of the hearing judgment was rendered in favor of each of the defendants in said suit, that is to say, in favor of the Illinois Central Railroad Company and the Yazoo and Mississippi Valley Railroad Company, as shown by judgment of said Court, copy of which is hereto attached, marked Exhibit, "A".

And thereafter the said plaintiff, Earl Moore, appealed from said judgment of the Circuit Court of Hinds County to the Supreme Court of the State of Mississippi, on the 16th day of March, 1936, the said judgment of the Circuit Court of the First District of Hinds County, Mississippi, rendered in said cause, was by said Supreme Court of Mississippi affirmed and said suit was finally terminated adversely to the plaintiff, Earl Moore.

That all of the foregoing pleas and proceedings herein referred to appear in the records of the Circuit Court of the First Judicial District of Hinds County, Mississippi, in cause No. 8232, Earl Moore vs. Yazoo and Mississippi Valley Railroad Company, et al., in the records and proceedings of the Supreme Court of Mississippi in case No. 32,063, Moore vs. Yazoo and Mississippi Valley Railroad Company, et al., reported in 166 So. at page 395, reference to the pleas and proceedings in said Circuit Court and in said Supreme Court are prayed to

be made as often as may be necessary on the trial of this cause.

And that this defendant says that by reason of the foregoing facts the said judgment rendered by said Court in said cause No. 8232, Earl Moore vs. Yazoo and Mississippi Valley Railroad Company and Illinois Central Railroad Company, adjudicated all of the things sued for in this suit, and in which said suit the said plaintiff was the same as the plaintiff in the instant suit, and this defendant, the Illinois Central Railroad Company, was a defendant as in the instant suit, and the subject matter of the litigation was the same as the subject matter of the instant suit, and was in a Court
100 having jurisdiction of the parties and of the subject matter. And defendant says that this judgment is res adjudicata of all the matters and things sued for in this suit.

And this the defendant stands ready to verify.

MAY & BYRD,

Attorneys for Defendant.

EXHIBIT "A" to the foregoing Plea, being judgment in Cause No. 8232, entered Minute Book No. 22, p. 426, State Court, was copied heretofore at page 34.

101

SPECIAL PLEA No. 6.

Filed June 15, 1938.

(Title Omitted.)

Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and for a further and special

plea to the declaration exhibited against it in this cause, says actio non, because it says that there was never any written contract of employment between the plaintiff and this defendant; but that the contract of employment between plaintiff and this defendant was verbal and the alleged breach of contract occurred on February 15, 1933, and on said date plaintiff's cause of action, if any he had, or has, arose on said date, and more than three years elapsed from the date of said alleged breach of contract and the date of the filing of this suit, and this defendant says that by reason thereof this said suit is barred by the statute of limitations of three years, as provided by Section 2299 of the Mississippi Code of 1930.

And this the defendant is ready to verify.

MAY & BYRD,

Attorneys for Defendant.

102

SPECIAL PLEA No. 7.

Filed June 15, 1938.

(Title Omitted.)

Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration exhibited against it in this cause, says that the plaintiff ought not to have and recover anything by reason of said suit in any event in an amount in excess of thirty days' pay at the rate fixed in the schedule of wages, because the defendant says that the contract sued on in this cause provides, among other things, in Article 25, paragraph B thereof, as follows:

"(B) The rules and rates shall remain in effect until December 31, 1925, and thereafter until revised or

abrogated, of which intention thirty days written notice shall be given."

That is to say the said contract is terminable on thirty days written notice by either party. And this defendant says that the said contract as to said Earl Moore, the plaintiff, was abrogated on the 15th day of February, 1933, by reason of his discharge from the service of this defendant, notice of which discharge was given to the said Earl Moore in writing, and that if not effective on the said 15th day of February, 1932, the same became and was effective thirty days from said date and said contract as to said Earl Moore was ended thirty days after said date.

All of which the defendant stands ready to verify.

MAY & BYRD,

Attorneys for Defendant.

104 DEMURRER TO DEFENDANT'S FIRST SPECIAL PLEA.

Filed August 1, 1938.

(Title Omitted.)

Now comes the plaintiff, Earl Moore, and demurs to the first special plea, heretofore filed by the defendant herein, and for cause of said demurrer assigns the following:

First: That said special plea sets forth no defense to plaintiff's cause of action.

Second: That the contract sued on showed that it was not a contract terminable at will.

And for other causes to be assigned.

CHALMERS POTTER,
Attorney for Plaintiff.

105 DEMURRER TO SECOND SPECIAL PLEA.

Filed August 1, 1938.

(Title Omitted.)

And now comes the plaintiff, Earl Moore, and demurs to the Second Special Plea, heretofore filed by the defendant herein, and for cause of said demurrer assigns the following:

First: That said special plea sets forth no defense to plaintiff's cause of action.

Second: That the contract sued on shows on its face that it is a unilateral contract.

And for other causes.

CHALMERS POTTER,
Attorney for Plaintiff.

106 DEMURRER TO THIRD SPECIAL PLEA.

Filed August 1, 1938.

(Title Omitted.)

And now comes the plaintiff, Earl Moore, and demurs to the Third Special Plea, heretofore filed by the de-

fendant herein, and for cause of said demurrer assigns as follows:

First: That said special plea sets forth no defense to plaintiff's cause of action.

Second: That said contract shows on its face that it is a contract between the Brotherhood of Railroad Trainmen, of which this plaintiff was a member and under which contract he worked, and the defendant.

And for other causes.

CHALMERS POTTER.

107 DEMURRER TO FOURTH SPECIAL PLEA.

Filed August 1, 1938.

(Title Omitted.)

And now comes the plaintiff, Earl Moore, and demurs to the Fourth Special Plea, heretofore filed by the defendant herein, and for cause of said demurrer assigns as follows:

First: That said special plea sets forth no defense to plaintiff's cause of action.

Second: That paragraph "D" of Article 22 of said contract, quoted in said Fourth Special Plea, does not make it mandatory upon the plaintiff to demand a hearing or take an appeal, but these are only additional and permissible rights granted him under the contract, and said contract nowhere prohibits his right to sue until and unless he had exhausted the right of appeal.

Third: That the finding of the officers of said railroad are not binding because it is contrary to public policy to allow any man or person, natural or artificial, to be a judge of his own cause.

Fourth: That if said contract should be construed as to require that plaintiff demand a hearing and take or prosecute an appeal that the said provisions relied upon in this plea are then contrary to public policy in that they are an effort of the said parties to oust the Courts of the land of jurisdiction granted to them by the constitutional laws of the State of Mississippi.

And for other causes.

CHALMERS POTTER,
Attorney for Plaintiff.

108 PLAINTIFF'S REPLICATION TO DEFEND-
 ANT'S FIFTH SPECIAL PLEA.

Filed August 1, 1938.

(Title Omitted.)

Now comes Earl Moore, plaintiff, and for replication to the Fifth Special Plea heretofore filed by the defendant herein, says that although it is true that on the 15th day of October, 1932, this plaintiff filed a suit in the Circuit Court of the First District of Hinds County, Mississippi, being numbered 8232, (and the same was thereafter removed to this Honorable Court,) against the Yazoo & Mississippi Valley Railroad Company, and plaintiff says that said declaration was also filed against this defendant, but that through inadvertence the Clerk of said Court neglected to issue process against this defendant, but

when this matter was called to the attention of the plaintiff therein process was immediately issued against said defendant upon the original declaration, a copy of said declaration being hereto attached marked Exhibit "A" and prayed to be considered a part hereto as fully and completely as if copied herein, but plaintiff denies that on the 23rd day of February, 1933, he filed an amended declaration against the Yazoo & Mississippi Valley Railroad Company and this defendant.

109 It was alleged in said declaration, in suit No. 8232, and the following allegation constituted the gist of plaintiff's action herein, that the defendants therein had breached a contract between the Switchmen's Union of North America, of which plaintiff was, at the time he went to work for the Alabama & Vicksburg Railway Company, a member, in that he had been given a lower place on the seniority roster of both defendants in their Jackson Yards than the place to which he was entitled under the contract; yet plaintiff avers that the basis of his cause of action in said cause, to-wit, No. 8232, was breach of the contract originally entered into between the said Alabama & Vicksburg Railway Company and the Switchmen's Union of North America for a failure of this defendant and the Yazoo & Mississippi Valley Railroad Company to give him the place upon the seniority roster to which he was entitled, the contract between the Switchmen's Union of North America and the Alabama & Vicksburg Railway Company having been expressly assumed as alleged in the pleadings in said cause by the defendants therein, and all other matters alleged either in the declaration or in any subsequent pleading filed by either party thereto, did not form the basis of plaintiff's cause of action therein, but went merely to show and explain the extent of damages suffered by said plaintiff, or any attempt by the defendants to limit said damages.

That the cause of action between the Illinois Central Railroad Company and this plaintiff in said cause No. 8232 is in no way identical with the cause of action here sued on because the cause of action here sued on is based not upon the Switchmen's Union Contract but a contract between this defendant and the Brotherhood of Railroad Trainmen. The basis of this
 110 suit is not a failure to give plaintiff the place up the seniority roster to which he conceived he was entitled, but is a suit for his wrongful discharge under a contract of hire.

Plaintiff further alleges that said plea constitutes no defense because cause No. 8232 was decided by the Circuit Court of the First District of Hinds County and affirmed by the Supreme Court, upon the grounds that the contract therein sued on provided that within thirty days after the promulgation of the seniority list, the seniority list therein sued on having been promulgated in November, 1928, that any person not being satisfied with the number given him thereon should, within thirty days after the promulgation of said list, file a written protest; that this the plaintiff, in cause No. 8232, failed to do personally within the time required by the contract between the Switchmen's Union of North America and the Alabama & Vicksburg Railway Company, and for that reason a directed verdict was rendered against said plaintiff, which was affirmed by the Supreme Court of the State of Mississippi, a copy of the opinion of the Circuit Court and the opinion of the Supreme Court both being attached hereto marked Exhibits "B" and "C", respectively, and prayed to be considered a part hereof as fully and completely as if copied herein, and the issue herein involved has never been decided upon its merits either by this Court or any other Court.

All of which the plaintiff is ready to verify.

CHALMERS POTTER,

Attorney for Plaintiff.

EXHIBIT "A" to the foregoing has been previously copied herein, page 42.

EXHIBIT "B" to the foregoing has been previously copied herein, page 47.

EXHIBIT "C" to the foregoing has been previously copied herein, page 48.

111 DEMURRER TO SIXTH SPECIAL PLEA.

(Title Omitted.)

And now comes the plaintiff, Earl Moore, and demurs to the Sixth Special Plea heretofore filed by the defendant herein and for cause of said demurrer assigns as follows:

First: That said special plea sets forth no defense to plaintiff's cause of action.

Second: Because nowhere in said special plea is there any denial of any fact set forth in plaintiff's declaration and the declaration shows that the suit is based upon a written contract exhibited with the declaration and not upon a verbal contract and there is no denial of the execution of the contract sued on.

Third: That the allegations of said plea are not responsive to the issue tendered in plaintiff's declaration.

And for other causes.

CHALMERS POTTER,
Attorney for Plaintiff.

Filed August 1, 1938.

112 DEMURRER OF PLAINTIFF TO DEFEND-
ANT'S SEVENTH SPECIAL PLEA.

Filed August 1, 1938.

(Title Omitted.)

And now comes plaintiff and demurs to the seventh special plea of the defendant, and for cause of said demurrer assigns as follows:

First: That said plea presents no defense to plaintiff's cause of action.

Second: That the contract sued on shows on its face that it is a contract between the Brotherhood of Railroad Trainmen, of which plaintiff was a member, and defendant, and not between plaintiff as an individual and defendant, and that the giving of notice to plaintiff that the contract was abrogated did not terminate said contract as a whole so as to defeat plaintiff's rights thereunder.

Third: To so construe said contract would render meaningless the provision of the contract that plaintiff could not be discharged except for cause, and the provision of the contract providing for seniority of service.

Fourth: And would abrogate and void the Railroad Labor Act of the Congress of the United States providing for collective bargaining between Labor Organizations and Interstate Carriers; and said defendant is such a carrier.

CHALMERS POTTER,
Attorney for Plaintiff.

113

MOTION FOR JUDGMENT.

Filed September 23, 1938.

(Title Omitted.)

And now comes Earl Moore, plaintiff herein, and shows unto the Court that heretofore the defendant, the Illinois Centrail Railroad Company, withdrew, with leave of the Court, all pleas in bar that had been filed by said defendant at a time when this cause was pending in the Circuit Court of the First District of Hinds County, Mississippi, and filed a plea in abatement.

That said plaintiff demurred to said plea in abatement, and said demurrer to said plea in abatement was by this Court sustained.

That thereafter the said defendant filed seven special pleas, and that this plaintiff demurred to all of said pleas except the fifth, and filed a replication to said fifth special plea, and the defendant railroad company demurred to plaintiff's replication to said fifth special plea. That thereafter the demurrer of the defendant to plaintiff's replication to the fifth special plea was overruled, and the demurrers of the plaintiff to the remaining six special pleas were by the Court sustained.

114

That under the provisions of Section 548, Code of 1930, it is provided:

"If the plaintiff demur to the plea of the defendant, and the demurrer be sustained, the judgment shall be that the defendant do answer over to the declaration; but he shall be compelled to plead to the merits, and the plaintiff shall not be delayed of his trial. And if the plea then filed be demurred to, and such demurrer be sustained, further leave to plead shall not be granted."

Wherefore, under the provisions of the section last above quoted, plaintiff moves that the defendant be not allowed to plead further, and that a judgment be rendered against it with a writ of inquiry to assess plaintiff's damage.

CHALMERS POTTER,
Attorney for Plaintiff.

115

ORDER.

Filed October 11, 1938.

C. O. B. 1, p. 57.

(Title Omitted.)

Came on this day this cause to be heard upon the demurrer of the plaintiff to the defendant's first, second, third, fourth, sixth and seventh special pleas, and the demurrer of the defendant to plaintiff's replication, and came the parties in their own proper persons and by their attorneys, and the Court having heard and considered the same, and being of the opinion that the demurrers of the plaintiff are well taken and should be sustained and that the demurrer of the defendant was not well taken and should be overruled.

Therefore, be it and it is hereby Ordered and Adjudged that the demurrers of the plaintiff to the defendant's first, second, third, fourth, sixth and seventh special pleas be, and the same are, hereby sustained; and
116 that the demurrer of the defendant to the plaintiff's replication to its fifth special plea be, and the same is, hereby overruled, to all of which the defendant excepted.

The motion of the plaintiff for judgment, under Section 548 of the Mississippi Code of 1930, be and the same is hereby overruled, to which action of the Court the plaintiff excepted.

It is further Ordered and Adjudged that the defendant do answer, under the new rules of procedure, the plaintiff's pleadings on or before the 20th day of October, 1938, but will not be required to raise the same points which it has heretofore raised.

Ordered and Adjudged this the 8th day of October, 1938.

S. C. MIZE,
United States District Judge.

117 United States District Court, Southern District
of Mississippi, Gulfport, Mississippi.

Chambers of Sidney C. Mize, District Judge.

August 16, 1938.

Hon. Chalmers Potter,
Attorney at Law,
Jackson, Mississippi.

Messrs. May & Byrd,
Attorneys at Law,
Jackson, Mississippi.

Re: Earl Moore vs. I. C. Railroad Co.

Gentlemen:

I have reached the conclusion that the decision of the Supreme Court of Mississippi in the case of Moore vs.

I. C. Railroad, 176 So. 593 is applicable, and that in view of the McGloin case cited therein the demurrers of the plaintiff to special pleas #1, #2, #3, #4, #6, #7 of the defendant should be sustained, and that the demurrer of the defendant to the replication of the plaintiff to defendant's special plea #5 should be overruled.

I think the decision of the Mississippi Supreme Court, viewed in the light of the Erie Railway Company case by the United States Supreme Court is conclusive upon this Court. The pleadings in the case before the Supreme Court of Mississippi are identical with the pleadings in the case now before the Court with the exception of the 7th Special Plea of the defendant. I think the demurrer

118 to the 7th Special Plea of the defendant is well taken for the reason that it is clear that the intent of the contract was that it could be abrogated as a whole by either party upon 30 days notice of such intent to abrogate. In other words, the Brotherhood, acting through its proper representatives, could have served notice that the contract would be abrogated. Or, under the contract, the Railroad Company could have served notice upon the entire Brotherhood that the contract would be abrogated. It was not the intent of the contract that the Railroad Company could say to one employee that he is discharged within thirty days. I think this meaning is clear and for that reason I sustained the demurrer.

* While it is true that a decision of the Supreme Court of Mississippi in a particular case is not necessarily the law of the case for absolute guidance of the lower Federal Court, yet when the case reaches the lower Federal Court the same rules of law with reference to all of the cases apply in the Federal Court as would apply in the Supreme Court of the State itself. If the Federal Court were clearly of the opinion that the last announcement of the Supreme Court was erroneous and in conflict with prior decisions of the Supreme Court on the same

question, which had been overlooked by the Supreme Court, and that the Supreme Court did not intend to overrule such cases or depart from the principles announced therein, then the lower Federal Court would be justified in declining to follow the decision as the law of the case. In the present case, however, it is clear that the announcement of the Supreme Court of Mississippi is exactly what Mississippi Supreme
 119 Court intends to hold, and it is, therefore, absolutely binding upon this Court under the decision of the Erie Railway Company case.

I am returning the file of papers to the Clerk there at Jackson, but I do not find that the demurrers have been filed. If so, they are not with this file that has been sent to me. I have assumed, however from the statement of counsel in the argument that it was the intention, and probably there may have been on file in Jackson demurrers to all of the special pleas of the defendant except as to Special Plea No. 5; that as to this plea there was a replication by the plaintiff and a demurrer by the defendant to this replication. I wish you gentlemen would check the file to see that the pleadings are on file to reflect this situation of the record, and then you may draw an order and forward it to me and I will sign it, allowing the defendant such reasonable time in which to plead further as you gentlemen may agree upon. If you cannot agree, then I will fix the time so as to make the case one at issue to be tried at the next convening of Court.

Very sincerely yours,

S. C. MIZE,

District Judge.

Filed October 4, 1938.

(Title Omitted.)

Earl Moore, a citizen of Mississippi, sued the Illinois Central Railroad Company, a citizen of Illinois, for damages growing out of an alleged breach of contract. The case originated in the State Court of Hinds County, in which Court the defendant filed six special pleas. The plaintiff demurred to the first four and sixth and replied to the fifth, to which replication the defendant demurred. The lower Court sustained the contentions of the defendant and the case was thereupon appealed by the plaintiff to the Supreme Court. That Court reversed the lower Court holding that the demurrers to the first four pleas and the sixth plea should have been sustained and that the defendant's demurrer to plaintiff's replication should have been overruled. This case is reported in 176 Southern Reporter, page 593.

The mandate of that Court having gone back to the lower Court, the plaintiff thereupon amended his declaration and increased his demand for damages to the sum of \$12,000.00. Thereupon the defendant immediately filed a petition to remove to this Court, which was sustained and the case transferred here; therefore, this Court has jurisdiction.

121 There are two major questions to be determined from the record in this Court. The first is the validity of the contract that was entered into between the defendant, Illinois Central Railroad Company, and the Brotherhood of Railroad Trainmen, of which Brotherhood the plaintiff was a member. This contract was a valid contract, although the plaintiff was not a direct party thereto except as made so for his benefit by the agreement of the Brotherhood of Rail-

road Trainmen with the defendant company. It will be unnecessary to detail further the facts of the controversy as they are fully set out in the report of the case in the Southern Reporter supra.

The defendant, after the transfer of the case here, obtained leave to withdraw all of its pleadings theretofore filed and then filed a plea in abatement. A demurrer was filed to this plea and was sustained. Thereafter the defendant filed special pleas 1 to 7 inclusive, but did not file a plea of the general issue. These pleas were substantially the same as were filed in the State Court. The plaintiff contends that the decision of the State Court on these matters is *res adjudicata*. The defendant contends that the decision of the State Court is simply the law of the case and that this Court has the power to determine for itself the sufficiency of these pleas. It is not necessary to determine whether the effect of the ruling is *res adjudicata* or the law of the case in view of the holding of the Supreme Court of the United States in the recent case of *Erie Railroad Company vs. Tompkins*, 304 U. S. Supreme Court Reports, page 64. The decision of the Supreme Court of Mississippi was an announcement of the Court of last resort in this State of the law pertaining to the contract sued upon, and under the *Erie Railroad Company* case is conclusive.

122

This Court having announced its intention of sustaining the demurrer of plaintiff to the six special pleas, 1, 2, 3, 4, 6, and 7, and overruling the demurrer of the defendant to plaintiff's replication to the 5th special plea, the plaintiff thereupon objected to the defendant being permitted to plead further and asked for judgment in accordance with Section 548, Mississippi Code of 1930. A construction of that statute, as well as of the Federal rules of civil procedure, which went into effect on September 16, 1938, is therefore presented.

Section 548 of Code of 1930 is as follows:

"If the plaintiff demur to the plea of the defendant, and the demurrer be sustained, the judgment shall be that the defendant do answer over to the declaration; but he shall be compelled to plead to the merits, and the plaintiff shall not be delayed of his trial. And if the plea then filed be demurred to, and such demurrer be sustained, further leave to plead shall not be granted."

Plaintiff contends that this section is mandatory and this Court does not have the discretion to grant further leave to plead. It is doubtful if plaintiff's contention would be sustained under the Mississippi State practice. It has been the policy of the Mississippi Courts, as well as the legislature, to permit amendments liberally in furtherance of justice and of the disposition of controversies on the merits. Section 533 provided that many pleas might be pleaded at the same time when appropriate to the action without leave of the Court along with the general issue. Section 532 of the Code provided that

123 if the plaintiff took issue on a plea in abatement and it was found in his favor, that he should have judgment respondeat ouster and that he should not have judgment quod recuperet, and that the defendant should be permitted to plead to the merits. Section 567 of the Code provides that the Court shall have full power to allow all amendments to be made in the pleadings or proceedings at any time before the verdict so as to bring the merits of the controversy fairly to trial. These sections have been construed by the Court of last resort to permit amendments liberally, and undoubtedly under these sections it would not be an abuse of discretion to permit the defendant to plead further. See also *Wilkinson vs. Cook*, 44 Miss. 367. However, this question having arisen since the Federal rules of civil procedure became effective, the statutes of

Mississippi are not controlling. The Federal rules of civil procedure control in this Court with reference to pleadings.

Among other purposes of the Federal rules of procedure recently promulgated by the Supreme Court of the United States in pursuance of an Act of Congress authorizing it to be done, is to settle controversies on their merits rather than to have them dismissed on technical points. The Hon. Martin T. Manton, senior Circuit Judge of the Second Circuit, U. S. Circuit Court of Appeals, in a foreword to Moore's Federal Practice on the new Federal rules discusses briefly the history and purpose of these rules. This foreword is full of wisdom and should be read by every member of the bar. One of the outstanding reforms contained in the rules is:

124 "Decisions are to be on the merits and not on procedural niceties." Moore's Federal Procedure, page 4. Mississippi practice, as hereinbefore shown, was one of liberal amendments, but even in those States where there is a restrictive State practice these Federal rules supersede, and the Federal Courts are no longer obliged to follow any restrictive practice of procedure of the State,—Moore's Federal Practice, page 800 and the authorities therein cited.

The entire spirit of all the rules as adopted is to the effect that controversies shall be decided upon the merits. The very first rule provides that they shall be construed to secure the just, speedy and inexpensive determination of every action. Rules 7 to 14 inclusive deal particularly with pleadings both of the plaintiff and the defendant, and it is not difficult to reach the conclusion that their purpose is to insure a fair trial upon the merits without unreasonable delay and to place upon counsel representing a party much responsibility. Rule 15 deals particularly with the question now before the Court and provides that a party may amend his pleading once as a matter of course at any time before a responsive pleading

is served and that thereafter a party may amend his pleadings only by leave of Court,—“and leave shall be freely given when justice so requires.” Likewise paragraph (b) of the same rule permits amendments whenever necessary to conform to the evidence, and the Court shall allow such amendments freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the Court that the admission of such evidence would prejudice him upon the merits. Paragraph (c) of rule 81 provides that these rules shall apply to civil actions removed into
 125 the District Courts of the United States and shall govern all procedure after removal. Rule 86 provides that all pleadings in actions pending on the effective date shall be governed by these rules, except to the extent that in the opinion of the Court their application would not be feasible or would work an injustice. It, therefore, will be seen that the question involved here is governed by these rules, since their application will not work any injustice upon any of the parties.

It will be unnecessary to mention any other rules, as from the foregoing it is clear that amendments to pleadings are liberally allowed. The defendant in this case in filing these pleas raised substantial questions and was acting in good faith and not for the purpose of delay. His manner of raising his questions was proper under the procedure existing at the time the pleas were filed and the defendant should not be penalized. The defendant will be required to plead under the new rules, but will not be required to raise the same points which he has already raised, but is now specifically given the advantage and allowed an exception to every adverse ruling that has been made by the Court in this case to his defenses.

The demurrers of the plaintiff to defendant's special pleas 1, 2, 3, 4, 6 and 7 are sustained, and the demurrer of the defendant to the plaintiff's replication to the de-

fendant's 5th special plea is overruled. The defendant is allowed fifteen days in which to answer the declaration of the plaintiff in conformity and as provided by the Federal rules of civil procedure. The plaintiff's declaration is substantially in form now as provided
 126 by the rules and the plaintiff will not be required to change the form of his declaration. The motion of the plaintiff for judgment declining to permit the defendant to plead further is denied. Orders may be entered accordingly.

SIDNEY C. MIZE,

United States District Judge.

Gulfport, Mississippi, October 3, 1938.

Appearances:

Hon. Chalmers Potter, Jackson, Mississippi,
 Representing Plaintiff.

Messrs. May & Byrd, Jackson, Mississippi,
 Representing Defendant.

127 AMENDMENT TO PARAGRAPH 6 OF DECLARATION BY AGREEMENT WITH THE DEFENDANT.

Filed October 20, 1938.

(Title Omitted.)

That on or about February 15, 1933, and without cause, the said defendant did arbitrarily discharge from its employ said plaintiff by letter, a copy of said letter being hereto attached, marked Exhibit "C" and prayed to be made a part hereof as fully and completely as if copied herein, and although said plaintiff has diligently sought

employment since said time, he has been unable to obtain employment.

CHALMERS POTTER,
By HENRY E. BARKSDALE.

Old Mer. Bk. Bldg., Jackson, Miss.

128

EXHIBIT "C".

Moore vs. I. C. RR. Company.

(Copy)

8086

Illinois Central System.

McComb, Mississippi, February 15, 1933.

Mr. Earl Moore,
Jackson, Miss.

Dear Sir:

This is to advise that your services as an employee of the Illinois Central Railroad Company are no longer desired and your employment is at an end effective this date.

Please deliver to Mr. T. K. Williams, Trainmaster, all Company property now in your possession, including your Annual Pass, as well as switch key and rule books.

Yours very truly,

(Signed) J. F. WALKER,

Superintendent Louisiana Division,
Illinois Central Railroad Company.

JFW-EM

129 MOTION TO AMEND DECLARATION.

(Title Omitted.)

And now comes Earl Moore, plaintiff herein, and moves the Court that he be allowed to amend his declaration, heretofore filed herein, by inserting between the first and second paragraphs thereof the following:

"That on May 1st, 1924, the defendant railroad company did promulgate and publish a certain Schedule of Rules and Rates of Pay for Trainmen, which Schedule of Rules and Rates of Pay for Trainmen is, in all respects, identical with the contract entered into by the Brotherhood of Railway Trainmen and the defendant, which is annexed to the original declaration as Exhibit 'A', and said published Schedule of Rules and Rates of Pay for Trainmen remained in full force and effect for all times mentioned in the declaration, and said plaintiff was entitled to the benefits conferred by said Schedule of Rules and Rates of Pay for Trainmen to the same extent that he was entitled to the benefits of the contract between said defendant and the Brotherhood of Railway Trainmen attached to the original declaration as Exhibit 'A'."

CHALMERS POTTER,
Attorney for Plaintiff.

130

ORDER.

Filed October 25, 1938.

C. O. B. 1, p. 60.

(Title Omitted.)

Came on this day this cause to be heard upon motion of the plaintiff to be allowed to amend his declaration

heretofore filed herein, and the Court having heard and considered said motion and being of the opinion that the same is well taken, it is, therefore, Ordered and Adjudged that said amendment be, and the same is hereby, allowed.

Ordered and Adjudged this 24th day of October, 1938.

S. C. MIZE,

United States District Judge.

131

ANSWER OF DEFENDANT.

Filed October 20, 1938.

(Title Omitted.)

Now comes the defendant, Illinois Central Railroad Company, by its attorneys and for answer to the declaration filed against it in the above styled cause, says:

1. It denies that on February 15, 1933, plaintiff was a member of a certain labor organization known as the Brotherhood of Railroad Trainmen. It admits that on the 15th day of February, 1933, there was in existence an agreement covering the schedule of wages and working conditions governing switchmen and trainmen, which said agreement was between the Illinois Central Railroad Company and the Brotherhood of Railroad Trainmen, and which said agreement provided for rules and rates of pay of trainmen and switchmen.

2. It admits that plaintiff was employed by said defendant as a switchman. The date of his employment being June 2, 1926. But denies that the plaintiff was a member of the Brotherhood of Railroad Trainmen for

a long period of time prior to February 15, 1933, he having been expelled from said labor organization.

3. It admits the allegations of Paragraph 3 of the declaration.

132 4. It admits the allegations of Paragraph 4 of the declaration.

5. It denies that from the date that plaintiff entered the employment of defendant as a switchman in the Jackson, Mississippi, yards plaintiff had rendered faithful and efficient service to the defendant, and denies that the plaintiff had been, and was at all times mentioned in the declaration, except when the said plaintiff was sick, ready, willing and able to comply with all rules, regulations and contracts of the defendant.

6. It admits that on February 15, 1933, it discharged plaintiff from its employment, but denies that the said discharge was without cause or was arbitrary. It charges the truth to be that it discharged the said plaintiff for cause, as it had a right to do. The said cause being that the said plaintiff was an unsatisfactory employee in that he had for a long period of time failed to work regularly, although able to do so. The said plaintiff frequently laying off and refusing to work, thereby causing disruption in the proper performance of the duties of the switching crew of which he was a member, and in addition thereto the said plaintiff did on or about the 17th day of October, 1932, file a suit in the Circuit Court of the First District of Hinds County, Mississippi, against this defendant, by which said suit he challenged the action of this defendant in establishing a seniority roster for switchmen and yardmen in the Jackson, Mississippi, yards, which seniority roster was promulgated by this defendant through its officers and employees

after agreement thereto by and between the Brotherhood of Railroad Trainmen, representing a large majority of employees in the Jackson, Mississippi, yards, which said consolidated roster was published by reason of the fact of the combining of the work in the Jackson yards of the Alabama and Vicksburg Railway Company, which was at that time leased by the Yazoo & Mississippi Valley Railroad Company, and the work of the Gulf and Ship Island Railroad Company and the work of the Yazoo & Mississippi Valley Railroad Company and the work of the Illinois Central Railroad Company. That the said Earl Moore, plaintiff in this case, well knowing that said seniority roster had been promulgated as aforesaid, continued to work under said consolidated seniority roster with a number on said roster which had been assigned to him under said consolidated roster, and the said Earl Moore, who had long been a member of the Brotherhood of Railroad Trainmen, although not a member at the date of said suit, knew that the said Brotherhood of Railroad Trainmen, acting through its representatives, had negotiated with the officers of the Illinois Central Railroad Company and with them had agreed upon the consolidated roster. That said suit entered as aforesaid was groundless and was known to, or should have been known to the said Earl Moore as being groundless, but notwithstanding the fact that said suit was groundless, nevertheless the said Earl Moore filed the same. That by reason of the filing of said suit this defendant was caused to expend and did expend large sums of money defending the same, and was compelled to and did bring to Jackson, Mississippi, for the said trial a large number of witnesses at great expense, exceeding \$2,500.00; all for the purpose of defending said groundless lawsuit. That this defendant was compelled to bring to Jackson, Mississippi, many of its supervising officers who were needed on other points of the railroad to properly

perform their duties and to operate said railroad, and they were caused to lose a great deal of time from their necessary duties; all at a great expense as hereinbefore set out, and all on account of said groundless lawsuit.

That the said Earl Moore, plaintiff herein, was but one of a large number of switchmen in the Jackson, Mississippi, yards who had been affected by the consolidated roster published as aforesaid, and the filing of said suit by the said Moore and his agitation of the question among the other switchmen and the public generally caused dissatisfaction among other employees of this defendant in the city of Jackson, Mississippi, and the same was detrimental to the interests of this defendant. That for many years it has been the rule of the Illinois Central Railroad Company, well known to all its employees, that whenever any of said employees see fit to institute suit against the Illinois Central Railroad Company they immediately forfeit all right to employment by the Illinois Central Railroad Company and are discharged, and this fact was well known to the plaintiff, Earl Moore, when he filed said suit on the said 17th day of October, 1932, and this defendant says that by reason of the foregoing the discharge of the said Moore was not arbitrary and not in violation of any contract existing between this defendant and any other person or organization. And it denies that plaintiff has diligently sought employment since his discharge, and denies that he has been unable to obtain employment.

135 7. The defendant denies that the minimum pay per day provided by said contract was \$6.64, and it denies that plaintiff, if he had not been discharged, would have worked a sufficient number of days as No. 52 on the roster to have earned the sum of \$12,000.00, and it denies that there was a breach of said contract, and denies that there was an arbitrary discharge of the plaintiff, and

denies that plaintiff has earned nothing since his discharge.

8. It denies that the plaintiff has been damaged in the sum of \$12,000.00, or any other amount.

And now having fully answered, defendant prays to be hence dismissed.

ILLINOIS CENTRAL RAIL-
ROAD COMPANY,

By J. L. BYRD,
Attorneys.

MAY & BYRD,
Attorneys for Defendant.

136

(Title Omitted.)

Appearances:

Honorable Chalmers Potter, Jackson, Mississippi,
Attorney for Plaintiff.

Messrs. May & Byrd, Jackson, Mississippi,
Attorneys for Defendant.

Stenographer's transcript of testimony taken at the trial of the above styled case before Honorable Sidney C. Mize, United States District Judge, at Jackson, Mississippi, on November 10, 1938.

137 EARL MOORE, Plaintiff, after having been
duly sworn, testified as follows:

Direct Examination.

By Mr. Potter:

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. Where do you live?

A. Jackson.

Q. What was your first railroad experience and with what railroad?

A. In 1920 with the Alabama & Vicksburg Railroad.

Q. You continued to work there until the Y. & M. V. leased it in 1926?

A. Yes, sir.

Q. From 1926 to February, 1933, by whom were you employed?

A. I. C.

Q. In what capacity?

A. Switchman.

Q. Does the I. C. Railroad Company have what they call a service card?

A. Yes, sir.

Q. On each employee?

A. Yes, sir.

Q. What is supposed to be noted on that card by the railroad?

A. If a man has ever had demerits it is supposed to be on it.

Q. The lawsuit that has been mentioned was a suit that you filed against the I. C. and Y. & M. V. in the Circuit Court of Hinds County in 1932?

A. Yes, sir.

Q. At the trial of that case in response to an interrogatory addressed under the State statute to the defendant in this case, did the defendant file a copy of your efficiency record?

A. They did.

Q. I will ask you if this is a copy of that efficiency record?

A. It is.

By Mr. Potter:

We now desire to introduce in evidence page 117 of the Supreme Court Record in the case of Earl Moore vs. I. C. R. R. Co., Exhibit "A" to this record.

139

EXHIBIT "A"

(Page 117—Transcript Supreme Court of Mississippi.)

Exhibit No. 3 Witness Plaintiff. >

Date 10/2/35.

R. S. Streit, Official Reporter.

(Copy Efficiency Record.)

Born 6/13/1900.

Pen. Cr. B. No.

11/ 2/1920 Entered Service A&V
Ry as switchman.

6/ 3/1926 Transferred to IC RR
as switchman, Jack-
son, Miss.

11/23/1926 Failure to have watch
comparison 2nd pe-
riod October—

5

4/30/1927 By Circular 6—

Clear

8/23/1928 Re-examined on Rules,
and qualified Certi-
ficate 19073.

1/16/1929 Re-examined physically and qualified.

9/13/1929 Failure to get watch comparison August "A"—

5

2/13/1930 Examined on Transportation Rules as Engine Foreman.

3/13/1930 Circular 6—

Clear

9/14/1939 Re-examined and qualified on Rules Certificate 6620.

8/ 3/1932 Granted 6 months leave of absence from July 27, 1932—sickness.

2/15/1933 Dismissed account unsatisfactory service.

2/17/1933 Requested hearing.

2/20/1933 Hearing granted at Jackson, Miss., and decision rendered against him by Superintendent.

Moore appealed to Gen. Supt. Quigley but did not pursue his appeal.

139-a Q. During the entire period that you worked for the I. C. R. R. Co. how many demerits were marked against you?

A. Ten.

Q. Ten penalties of five demerits each for failure to attend watch inspection?

A. Yes, sir.

Q. What is this book that I now hand you? This book that is marked Exhibit "A" to the plaintiff's declaration?

A. I. C. R. R. Company's schedule of rules and rates of pay of trainmen.

140 Q. By whom is that book published and distributed?

A. I. C. R. R. Co.

By Mr. Potter:

We now desire to introduce this book in evidence as Exhibit "B" to the testimony of Mr. Moore.

The foregoing Exhibit was filed as Exhibit "A" to the Declaration, and, per agreement of Counsel, the essential portions thereof have been heretofore herein copied at page 5.

Q. When a demerit or set of demerits are awarded against a person, how many demerits must accumulate in order to have an employee suspended?

A. Ninety.

Q. Is that found in these rules that I have just shown you?

A. Yes, sir.

By Mr. Potter:

I would like to read that.

By Mr. Byrd:

We object to that as it is not a part of the contract that is sued upon. I am not objecting to the introduction, but I am objecting to the inference that it is a part of the contract that he sues on. We don't concede that which he has introduced is a part of the Railroad Rules regarding switchmen.

141 By the Court:

I will overrule the objection.

Q. In order to clear up the matter properly for the Court, when a reprimand in multiples of five are placed against the record of an employee with satisfactory service, he can work those demerits off?

A. Yes, sir.

Q. And then his record is clear just as if no demerits had ever been assessed?

A. Yes, sir.

Q. And your service record that has been introduced in evidence shows that you had worked those demerits off?

A. Yes, sir.

Q. And when you were discharged there were no demerits against you?

A. No, sir.

Q. This official record of yours shows that you were granted six months leave of absence in July, 1932. Did you in February, 1932 report to anyone in Jackson for a physical examination?

A. Yes, sir.

Q. Who?

A. Dr. Barksdale.

Q. What relation did Dr. Barksdale bear with the Company?

142 A. Chief surgeon.

Q. I now hand you an instrument purporting to be a surgeon's discharge certificate of February 2, 1933.

By whom is that signed?

A. Dr. J. W. Barksdale.

By Mr. Potter:

We now desire to introduce in evidence, with leave to substitute a copy, page 155 of the Supreme Court record in the case of Earl Moore v. I. C. R. R. Co.,—Exhibit "C" to the testimony of Mr. Moore.

143

EXHIBIT "C".

Page 155 Supreme Court Transcript."

(Exhibit 6 to Witness Moore testimony.)

Illinois Central System
Hospital Department

Form C. S. 11

Surgeon's Discharge Certificate

Feb. 2, 1933

To R. W. Bardin (Employing Officer)

The Bearer Earl Moore

Occupation Switchman at Jackson, Miss., has been under my professional care since 1-18 1932 is hereby discharged, being able to resume work.

J. W. BARKSDALE,
Surgeon.

Important Notice.—When an Employee is injured on duty this certificate must be filled out by the attending Surgeon in triplicate, the first copy forwarded to the chief Surgeon, Chicago, the second copy forwarded to the Local Glaim Agent covering the territory in which the accident occurs, and the third copy be given to the employee who will pre-

sent it in person to his employing officer. In cases where Employees are injured off duty or in medical cases, it will only be necessary that one certificate be filled out at the time the employe is able to resume work, and the latter will present it personally to his employing officer, indicating that he is discharged from further treatment.

143-a Q. Mr. Harding at that time was your immediate superior?

A. Yes, sir.

Q. Holding the position of Yard Master in Jackson?

A. Yes, sir.

Q. He is now dead?

A. Yes, sir.

Q. When you received that certificate from Dr. Barksdale did you report to anyone, and if so, to whom?

A. I reported to Yard Master R. W. Harding.

Q. Had you been able to go to work? I notice that Dr. Barksdale states that you had been under his professional care since January 18, 1932. Had you been able to perform any duties of switchman since January 18, 1932?

A. No, sir.

144 Q. Because of your physical condition?

A. Yes, sir.

Q. What has been the state of your health since Dr. Barksdale gave you that certificate?

A. Good.

By Mr. Porter:

In view of your Honor's ruling that it becomes a question of good faith of this man in filing the law suit, and after the ruling has been made, we offer in evidence the pleadings, opinion of the Circuit Judge and opinion of the Supreme Court in the case of Earl Moore v. Y. & M. V. R. R. Co. and I. C. R. R. Co., it being agreed that this is the case referred to by the defendant in its answer. Exhibit "D" to the testimony of Mr. Moore. (The Judgment is

copied page 34, supra; the Declaration at page 42; Opinion Circuit Court, page 47; Opinion Supreme Court, page 48, and some of the pleadings are copied in Special Plea No. 5, page 29.)

By Mr. Byrd:

I agree to that but I desire to object to the introduction of the record because it unnecessarily encumbers the record.

By The Court:

I will overrule the objection.

Q. That case, the record of which we have just introduced in evidence, was a case growing out of the
145 fact that prior to November, 1929 and from the date of the lease in 1926, the I. C. R. R. Company had maintained two separate yards in Jackson, was it not?

A. Yes, sir.

Q. One known as the West Yard and another known as the North Yard?

A. Yes, sir.

Q. Who worked at the West Yard?

A. The employees of the A. & V.

Q. Who worked at the North Yard?

A. I. C. employees.

Q. Up until the seniority list of 1929, how many seniority lists were maintained?

A. Two prior to November.

Q. They had a separate seniority list for the North yard?

A. Yes, sir.

Q. And a separate list for the West yard?

A. Yes, sir.

Q. In November a consolidated seniority list was published?

A. Yes, sir, on the 13th.

Q. On that consolidated seniority list were you given your correct age at which you went to work for the A. & V.?

A. No, sir.

Q. You were given a later age, were you not?

A. Yes, sir.

Q. What was the approximate ratio between
146 the number of engineers working in the North yards and the number of engineers working in the West yards?

A. The North Yards worked 12 engineers and the West Yards worked 4 engineers.

Q. Were the old A & V. switchmen put on on a basis of 3 to 1?

A. Two of them.

Q. And the next one was numbered what?

A. I don't recall that exactly. The third man was J. C. Hampton, 36.

Q. And thereafter there were put on 4 I. C. men and 1 A. & V. man?

A. No, 5.

Q. Your number was what?

A. 52.

Q. When did you start working for A. & V.?

A. November 2, 1920.

Q. When did you start working for I. C.?

A. June 2, 1926.

Q. What age were you given on the seniority list?

A. September, 1924.

Q. As I understand it, there were two labor organizations to which switchmen belonged and they were the Brotherhood of Railroad Trainmen and the Switchmen's Union of North America?

A. Yes, sir.

Q. The Switchmen's Union of North America had priority over the I. C.?

147. A. Yes, sir.

Q. And the Brotherhood had a contract with the I. C. R. R. Co.?

A. Yes, sir.

Q. You belonged at the time you were working for the Alabama & Vicksburg Railroad Company to the Switchmen's Union of North America?

A. Yes, sir.

Q. And you later became a member of the Brotherhood of Railroad Trainmen?

A. Yes, sir.

Q. When did you become a member of the Railroad Trainmen?

A. Sometime in 1927.

Q. Please state whether or not, under the constitution and rules of each of these organizations they have what is known for each local lodge as the grievance man?

A. Yes, sir.

Q. What, in general, are the duties of the grievance man?

A. To handle all the disputes.

Q. Between whom?

A. Trainmaster and officials of the Railroad.

Q. Between the members of the Union and the officials of the Railroad Company?

A. Yes, sir.

Q. Who was the grievance man of the Switchmen's Union of North America? I mean at the lodge located at Jackson at the time of the consolidation of the

148 roster in 1929?

A. A. E. McGehee.

Q. When that was published, with the exception of the first two men on the seniority list that has been introduced in evidence here, there is the negro John Tobias and Dolittle, who were given their actual age, did all of the members of the Switchmen's Union of North America feel that they were aggrieved?

By Mr. Byrd:

We object.

By the Court:

I will sustain the objection because that covers too wide the field under the question of good faith.

Q. Did Mr. McGehee take up with the officials of the Railroad a grievance on behalf of you and others, and if it was you and others, what others?

A. It was me and all the other men that were members of the Switchmen's Union.

Q. That had formerly worked for what Railroad?

A. Alabama & Vicksburg.

Q. Did he take that up after the promulgation of this roster?

A. Yes, sir.

Q. With whom?

A. Mr. R. W. Hartner.

Q. Was he able to effectuate any settlement with the Railroad Company?

A. No, sir.

149 Q. You did not personally file any protest with the Railroad Company?

A. No, sir.

Q. Not until January, 1931?

A. Yes, sir.

Q. Sometime in the year 1932 after you didn't get any relief, what did you then do?

A. Filed a law suit.

Q. Before you filed your lawsuit, what did you do?

A. Talked to the Superintendent of the I. C., the Louisiana Division.

Q. You couldn't get any relief from them?

A. No, sir.

Q. After you couldn't get any relief at all from the Railroad Company, what did you then do seeking to de-

termine whether you had any lawsuit or not? Did you take any steps looking toward getting any legal rights as to yourself?

A. Yes, sir.

Q. What did you do with reference to that?

A. I talked to an attorney.

Q. What attorney?

A. Mr. Chalmers Potter.

Q. At that time did I have any associate?

A. No, sir.

Q. Did you lay all the facts before me?

150 A. Yes, sir, I did.

Q. And what was my advice to you?

A. That I had a cause of action.

Q. Did you act in good faith on my advice?

A. I did.

By Mr. Byrd:

We object because the facts speak for themselves.

By the Court:

I will overrule the objection as the state of mind is competent as one of the circumstances.

Q. Would you have filed the lawsuit if reputable attorneys had not advised you that you had a cause of action?

A. No, sir.

By Mr. Byrd:

We object.

By the Court:

Objection sustained.

Q. Now, as I understand it, you had performed your duties for this Railroad Company from early in January, 1932 up until the date that you were discharged?

A. Yes, sir.

151 Q. Is that true or not?

A. Yes, sir.

Q. Then on February 15, 1933 did you receive a letter from Mr. Walker, Superintendent of the Louisiana Division?

A. Yes, sir.

By Mr. Potter:

We desire to introduce in evidence the letter of February 15, 1933 from Mr. Walker to Mr. Moore,—Exhibit "E" to the testimony of Mr. Moore.

(This Letter has been copied herein at page 96.)

Q. After that did you demand a hearing?

A. Yes, sir.

Q. Who was your representative?

A. Mr. A. D. McGehee.

Q. Was that hearing taken down by a stenographer?

A. Yes, sir.

Q. On your behalf did I obtain from the Railroad Company a copy of that hearing?

A. Yes, sir.

Q. I will ask you if this is a copy of that hearing that the Railroad Company furnished me?

A. Yes, sir.

152 By Mr. Potter:

We desire to introduce in evidence copy of the hearing as EXHIBIT "F" to the testimony of Mr. Moore.

Hearing given Mr. Earl Moore in Trainmaster's Office at Jackson, Miss., February 20, 1933, at 4:00 p. m., upon request contained in his letter of February 17, 1933, at which were present Mr. J. L. Morgan, Agent, and Mr. A. E. McGehee, representing Mr. Moore.

Questioned by Mr. J. F. Walker, Superintendent Illinois Central R. R.:

Q. Mr. Moore, I have your letter February 17th in which you asked for a hearing, and I am ready to give you the hearing as per your letter of the above date. What is your full name?

A. Earl Moore.

Q. Do you wish a representative present at this hearing, Mr. Moore?

A. Yes, sir, Mr. McGehee.

Q. You are employed with the Company, Mr. McGehee?

A. Yes, sir.

Q. Just what is it you want, Mr. Moore?

A. I want to know what I was taken out of service for.

Q. In your letter February 17, 1933, you asked to be advised the reason for your dismissal from the service of the Railroad Co.; I wish to advise you that you were dismissed account of being an unsatisfactory employee.

A. An unsatisfactory employee?

Q. Yes.

A. In what way?

Q. Isn't it a fact that instead of giving the Management of the Railroad Company an opportunity to handle your case to a conclusion you took the matter up through the Courts?

A. No, sir.

Q. You have not entered suit against the Railroad Company?

A. I have.

Q. You have?

A. Yes, sir.

Q. I have nothing further to add to my statement as stated before.

A. I am taken out of service for unsatisfactory service; will you give me a letter to that effect?

Q. You were taken out of service as an unsatisfactory employee. You asked me if I would give you a letter to that effect?

A. Yes, sir.

Q. I will give you a letter.

A. I am not taken out of service because of the law suit entered against the Railroad?

Q. I stated before what you were taken out of service for.

(Secretary was asked to read answer to question as to why Mr. Moore was taken out of service, and answer was read as follows: "In your letter February 17, 1933, you asked to be advised the reason for your dismissal from the service of the Railroad Co. I wish to advise you that you were dismissed account of being an unsatisfactory employee.")

Q. There is nothing else you want to know concerning this case?

154

A. No, sir.

Question asked by Mr. McGehee, representing Mr. Moore:

Q. This question you asked him about not handling with the Railroad Company. That is one reason he asked me to sit with him on this case. I was local Chairman.

A. Mr. McGehee, you misunderstood my answer to this question.

(Secretary was asked to read the answer to question, which was read as follows: "Isn't it a fact that instead of giving the Management of the Railroad Company an opportunity to handle your case to a conclusion you took the matter up through the Courts?") After the answer was read to Mr. McGehee he had nothing further to say.

Questioned by Mr. J. F. Walker, Superintendent:

Q. Unless you have something else, that is all I have to say.

A. That is about all I know of.

Q. We will write you a letter.

A. You will also send me a service letter?

Q. Yes, I guess we can furnish you with that. You will have to request it by letter.

155 By Mr. Potter:

"We now desire to introduce a paragraph from Section 3 of the lease between the Y. & M. V. and A. & V. Railroad Company,—EXHIBIT "G" to the testimony of Mr. Moore.

Section 3. The Lessee covenants that it will at all times for and during the term hereof, at its own cost and expense, assume and fully perform, according to the true intent thereof, during their existence, all contracts, agreements and undertakings of the Lessor existing at the effective date hereof and relating to the leased property or the use thereof, and also all contracts, agreements and undertakings of the Lessor which may at any time hereafter be entered into by the Lessor, with the written approval of the Lessee, in accordance with the provisions of this Indenture, and that it will save the Lessor harmless from any and all liability, loss or expense resulting from or incident to any claim made against the Lessor growing out of any failure of the Lessee so to do; that it will do all acts necessary and appropriate to prevent the forfeiture or loss of any of the Lessor's property, rights or franchises, and will refrain from the doing of any act which would cause or tend to cause such forfeiture or loss. It is understood that the Lessee assumes the leases for the general offices of the Lessor in the Queen & Crescent Building, New Orleans, Louisiana, expiring October 1, 1928, and all leases of offices of freight and passenger agencies, but that the Lessee does not assume under any provision of this Indenture liability on any contracts of employment (other than contracts with labor unions) made by the Lessor, extending beyond four months after the effective date of this Indenture.

156 Q. I notice in the efficiency record that was introduced that you were examined on the 13th of February, 1930 under the transportation rules as an engineer foreman. Is that true?

A. Yes, sir.

Q. In 1930, shortly thereafter, did you or not receive a promotion?

A. I did.

Q. To what capacity?

A. Engineer foreman.

Q. After you consulted me with reference to your rights under the consolidated roster, which you conceive to be in violation of your rights, do you know whether or not your lawsuit was immediately filed or whether an extensive investigation was made by me?

A. An extensive investigation was made.

Q. Did you file that lawsuit for the purpose of harrasing the Railroad Company, or did you in good faith file that lawsuit seeking to vindicate what you and I conceived to be your legal rights?

157 By Mr. Byrd:

We object.

By the Court:

I will sustain the objection on the ground that it has already been answered.

Q. What is the book that I now hand you?

A. Illinois Central Railroad System of Transportation Rules.

Q. By whom is this promulgated?

A. Illinois Central Railroad Company.

By Mr. Potter:

We wish to introduce this book as EXHIBIT "H" to the testimony of Mr. Moore.

(Not copied per agreement of counsel).

Q. Do you know of any other published rules that the Illinois Central Railroad Company has?

A. No, sir.

Q. After you were discharged by the Railroad Company, what was the first employment that you were able to secure?

A. November 16, 1936 with the United States Government.

Q. In what capacity?

A. Post Office Fireman.

Q. At what salary?

158 A. \$105.00.

Q. You have continued to hold that job from that time until the present time and still hold that job?

A. Yes, sir.

Q. In response to an interrogatory filed in this case in the State Court before it was removed to the Federal Court, did the Illinois Central Railroad Company furnish you with the number of days that Mr. Cutler had worked since February 15, 1936 and the amount that he earned?

A. Yes, sir.

Q. And they also stated in that the number of days that you would have been entitled to work had you not been discharged, did they not?

A. Yes, sir.

By Mr. Potter:

We now desire to offer in evidence the answers to the interrogatories propounded to the Railroad Company, which are found at page 9 of Supreme Court Record No. 32860, as EXHIBIT "I" to the testimony of Mr. Moore.

(The above copied herein heretofore at page 20.)

By Mr. Potter:

Without the necessity of interrogatories, the Railroad Company has furnished us with a statement of the earnings of Mr. Cutler, who was the next numbered man below Mr. Moore, up to date and we desire to introduce that in evidence. Exhibit "J" to the testimony of Mr. Moore.

EXHIBIT "J" TO TESTIMONY OF EARL MOORE.

Statement of Time Made and Wages Earned by H. H. Cutler, Employed as Switchman by IC RR at Jackson, Miss., Jan. 1, 1933, to Oct. 15, 1938.

	1933		1934		1935		1936		1937		1938	
	Days	Amount	Days	Amount	Days	Amount	Days	Amount	Days	Amount	Days	Amount
Jan. A.....	4	24.50	6	38.43	11	72.17	12	80.06	13	95.92	10	75.86
B.....	4	24.86	6	37.02	12	78.89	14	96.92	10	78.67	12	95.09
Feb. A.....	4	24.06	14	86.18	13	82.49	10	67.09	13	104.21	8	60.78
B.....	4	24.61	10	60.85	8	51.25	11	78.64	11	85.11	12	91.53
Mar. A.....	2	11.92	14	84.92	14	94.04	15	106.60	12	94.52	14	109.25
B.....	5	30.56	12	72.79	12	78.76	11	80.01	13	99.92	12	94.80
Apr. A.....	2	11.92	14	85.66	13	87.08	14	100.76	14	109.21	15	115.41
B.....	3	16.48	8	46.96	12	82.56	12	86.48	10	74.62	11	86.08
May A.....	7	40.98	11	68.39	13	89.46	10	71.67	13	99.65	12	90.96
B.....	10	60.85	12	72.78	9	60.45	15	107.23	11	81.76	14	105.47

Jun. A.....	7	43.06	12	72.72	5	33.84	15	108.44	12	87.57	13	98.87
B.....	9	54.96	8	52.58	2	13.76	11	80.55	13	96.34	13	98.30
Jul. A.....	6	37.22	4	24.49	9	62.56	14	102.37	13	94.18	12	89.37
B.....	8	49.58	6	37.08	14	98.78	12	87.96	12	89.97	14	104.84
Aug. A.....	5	30.57	9	56.15	11	74.46	15	108.98	14	107.21	13	99.04
B.....	10	62.28	13	80.77	14	94.81	11	78.94	12	89.30	13	98.87
Sep. A.....	13	79.25	14	87.22	14	100.14	14	104.92	14	108.27	14	113.16
B.....	14	86.04	12	75.64	12	87.69	12	91.17	12	91.04	12	100.07
Oct. A.....	15	95.45	15	96.42	15	110.18	14	105.45	13	117.17	14	111.24
B.....	11	69.62	10	65.95	11	81.62	12	92.11	13	103.09		
Nov. A.....	9	56.32	15	98.49	14	100.68	13	96.57	13	111.06		
B.....	7	43.27	11	69.14	12	83.45	12	90.64	12	95.65		
Dec. A.....	6	37.62	12	76.23	14	99.14	11	80.82	12	99.07		
B.....	5	31.06	6	37.66	9	64.41	11	82.69	11	83.86		
Total	170	1047.04	254	1584.52	273	1882.67	301	2187.07	296	2297.37	238	1838.99

160

Cross Examination.

By Mr. Byrd:

Q. You filed your other suit claiming under the Switchmen's contract, the contract with the Switchmen's Union of North America?

A. Yes, sir.

Q. And you stated on your cross examination in the trial of the case in Jackson that you were not relying upon any other contract, but were suing for relief under the contract of the Switchmen's Union of North America with the Alabama & Vicksburg Railroad Company?

A. At that time.

Q. The Switchmen's Union of North America had no contract with The Illinois Central Railroad Company covering the operations in the Jackson, Mississippi yard?

By Mr. Potter:

We object because that is a matter of law.

By the Court:

Objection overruled.

A. No, sir.

Q. After the Yazoo & Mississippi Valley Railroad Company leased the lines of the Alabama & Vicksburg Railroad Company, for sometime operation was carried on in what is known as the old A. & V. Yards in Jackson?

161

A. Yes, sir.

Q. And you were switchman in that Yard?

A. Yes, sir.

Q. You had your work service in that Yard?

A. Yes, sir.

Q. Sometime after the lease it was decided to combine the old A. & V. Yard with the I. C. Yard?

A. Yes, sir.

Q. When it was combined a question arose as to what service would be given the men from the two yards in the consolidated yard?

A. Yes, sir.

Q. And the Brotherhood of Railroad Trainmen who had the contract at that time with the I. C. R. R. Company covering the Jackson, Mississippi yard through its representative and the management through its representative worked out this consolidated roster that was afterward put in effect in Jackson?

A. Yes, sir.

Q. How many A. & V. Switchmen were there?

A. I don't know exactly how many were there.

Q. About how many?

A. About 14 I think.

Q. How many I. C. Switchmen?

A. I don't know that.

Q. About how many?

162 A. I guess it was thirty some odd.

Q. As the result of that agreement between the management and the representative of the Brotherhood of Railroad Trainmen a consolidated roster was put out for the Jackson, Mississippi yard on which the A. & V. men, outside the two last men were put on that old I. C. Roster on the basis of one A. & V. man to every five I. C. men?

A. Yes, sir.

Q. The effect of that was a man on the I. C. Railroad who was below the A. & V. man in seniority was shoved down at least 15 places, wasn't he?

A. The A. & V. man was put down.

Q. No, the I. C. man was shoved down, at least the lowest I. C. man was put down at least 15 men?

A. The I. C. men weren't disturbed.

Q. When they put in a man ahead of them he was disturbed?

A. Not on the seniority list.

Q. But they put some A. & V. men ahead of him,—ahead of the lower I. C. men?

A. In every five men they did.

Q. So when an A. & V. man might have gotten a lower seniority rating, it also resulted that way for the I. C. men sometimes?

A. It did in a few, yes, sir.

Q. You take Mr. Mauphis over there. He is a switchman. He had a place on the roster which was reduced on account of the A. & V. men being put in ahead of him, didn't he?

A. I was working before Mr. Mauphis ever went to work.

Q. I am talking about the switchman who was rated under you?

By Mr. Potter:

We admit that.

By the Court:

That is the only conclusion that can be drawn.

Q. When they made the consolidated roster it worked to the disadvantage of the I. C. men as well as the A. & V. men?

A. Yes, sir.

Q. You had a representative in the Switchmen's Union of North America?

A. Yes, sir.

Q. And under the contract with the railroad, whatever railroad it was, you say the I. C. assumed it—whatever railroad it was, there was machinery set up for bringing in complaints or grievances in regard to their seniority for the attention of the management of the I. C. Railroad?

A. Yes, sir.

Q. Did you use that machinery?

A. Yes, sir.

Q. Did you take it to the management of the I. C.?

A. Yes, sir, to the Board.

164 Q. What Board?

A. Labor Board.

Q. The Labor Board turned you down?

A. No, sir.

Q. What happened to it?

A. It is still there.

Q. It has been pending there how long?

A. Seven years.

Q. At the time you filed your suit how long had it been pending?

A. I don't know.

Q. The Brotherhood of Railroad Trainmen had machinery which you could have set in motion to review this question and have it tried out again?

A. They had one, yes, sir.

Q. Did you start that machinery in motion?

A. No, sir.

Q. When did you become a member of the Brotherhood of Railroad Trainmen?

A. I don't know exactly, but somewhere around 1927.

Q. When was this consolidated seniority roster put into effect?

A. November 13, 1926.

Q. The very next year you became a member of the Brotherhood of Railroad Trainmen?

A. Yes, sir.

Q. When they put out the consolidated list you continued to work under it?

A. Yes, sir, under protest.

165 Q. You continued to work under it for about five years before you filed your suit?

A. Yes, sir.

Q. In fact, it just lacks about a month of being six years before you filed your suit?

A. Yes, sir.

Q. And during that time you say you were complaining?

A. Yes, sir.

Q. Who were you complaining to?

A. The officials of the Illinois Central.

Q. What officials?

A. From the Trainmaster to the General Manager.

Q. Did you ever complain to Mr. T. K. Williams?

A. I complained to Mr. McLauren.

Q. He was the Superintendent. Did you ever complain to Mr. Williams?

A. No, sir.

Q. He was your head superintendent?

A. Yes, sir.

Q. You did go over the heads of the officers and complain to Mr. Atwell, the General Manager in Chicago?

A. Yes, sir.

Q. You wrote him letters about it?

A. Yes, sir.

Q. You didn't tell your superintendent that
166 you were writing letters?

A. No, sir.

Q. You didn't set the machinery of your own organization in motion?

A. No, sir.

Q. You worked on this consolidated roster for practically six years before you ever filed your lawsuit?

A. Yes, sir.

Q. And during all this time you were agitating it down there in the Yard?

A. No, sir.

Q. Didn't you say something to Mr. McGee about it?

A. I did at the time I filed the lawsuit.

Q. I am talking about before you filed the lawsuit?

A. No, sir.

Q. Didn't you say anything about it to any of the other

A. & V. Switchmen?

A. No, sir.

Q. Didn't you seek and get contributions from other A. & V. switchmen to help you pay the lawyer's fee and expenses of the trial?

A. No, sir.

Q. Didn't you agree with the other switchmen that your suit would be the test suit and you would file this suit and carry it through to conclusion as the basis for them filing a suit themselves?

A. No, sir.

Q. You deny that?

167

A. Yes, sir.

Q. When you went and got this certificate from Dr. Barksdale, where had you been? How long had you been off?

A. I had been off about six months.

Q. How long had you been sick?

A. All that time.

Q. All the whole six months?

A. Yes, sir..

Q. When did you decide that you were in shape to go back to work?

A. When the time was up.

Q. What time?

A. On February 2, 1933.

Q. Was that the time your leave of absence expired?

A. I think it was a little later.

Q. You were given a leave of absence on July 2, 1932?

A. Yes, sir.

Q. For six months?

A. Yes, sir.

Q. When did you report back to work?

A. On February 21, 1933.

Q. When you presented this certificate of Dr. Barksdale?

A. Yes, sir.

Q. You were sick in the fall when you filed your lawsuit, weren't you?

168 A. Sometime in that year I was.

Q. Were you sick in the first part of October, 1932?

A. Yes, sir.

Q. How long had you been sick then?

A. I don't recall exactly the days.

Q. Do you recall writing the company a letter addressed to Mr. Williams that on account of your physical condition you could no longer perform the duties of switchman and asked for a switchtender job?

A. I recall writing the letter, yes, sir.

Q. Do you know what the date of that letter was?

A. Not exactly.

Q. Wasn't it on September 7, 1932?

A. Yes, sir; I think it was.

Q. Look at this letter and see if that is not it?

A. Yes, sir, that is it.

By Mr. Byrd:

We desire to introduce the letter of September 7, 1932 in evidence as DEFENDANT'S EXHIBIT "1" to the testimony of Mr. Moore:

169 Jackson, Miss., September 7, 1932.

Mr. T. K. Williams, Trainmaster,
Jackson, Miss.

Dear Sir:

Due to the fact that my health will not permit me to resume work as a switchman, I would like to be permitted to occupy position of switchtender, third track, Jackson, Miss. yard.

If possible, I would like for you to handle this as promptly as possible and would appreciate your decision before October 10th, 1932.

Yours truly,
EARL MOORE,
Switchman.

Q. Why did you put that deadline of October 10, 1932?

A. For no reason. I just put it there.

Q. Isn't it a fact that you wanted a report before you filed a lawsuit against the company?

A. No, sir, not necessarily. It wasn't necessary.

Q. But you did file your lawsuit about the 15th of October, 1932?

A. The 15th or 17th.

Q. And you asked for this letter by October 10, 1932? You didn't tell Mr. Williams that if he didn't give you this job you were going to file this lawsuit and undertake to get your seniority raised?

A. No, sir.

Q. But you did give a deadline of October 10 when you wanted a reply to this letter?

A. Yes, sir.

Q. How long had you been sick prior to September, 1932?

A. I just don't know off hand.

Q. The contract that you introduced in evidence, that is the contract on which you are suing in this case?

A. Yes, sir.

Q. That is the only contract you have with the company,—with the Illinois Central Railroad Company?

By Mr. Potter:

We object because that is a conclusion of law.

171

By the Court:

I will overrule the objection.

Q. This so-called schedule of railroad rules is what you base your lawsuit on?

A. Yes, sir.

Q. That is the only contract of employment you have with the Illinois Central Railroad Company?

A. Yes, sir.

Q. Look at that. It is a little different book but I want you to see if it is the same contract?

A. Yes, sir, I know it is.

Q. The man next to you on the seniority list as you have testified was H. H. Cutler, and your contention is that on account of the fact that you are senior to Cutler, that every day that Cutler worked, if you had been on the seniority roster and had been employed, you would have been able to work?

A. Yes, sir.

Q. But you don't say you would have worked every day?

A. I think I would. I haven't been sick.

Q. You weren't sick in 1927 were you?

A. Sometime in that year I was.

Q. You weren't sick in 1928, were you?

A. Yes, some of it.

Q. You weren't sick in 1929, were you?

A. The days I was off I was sick, other than a few days that I would go bird hunting.

Q. Every day you were off you were sick?

172 A. No, sir, not every day.

Q. I want to ask you now about this question of employment. Do you know whether or not there is an agreement entered into between the Railroad and the Brotherhood of Yardmen and Switchmen respecting the number of hours that a switchman can work a month?

A. Now it is.

Q. How long has that been in force?

A. I think in 1934.

Q. What is the maximum number of hours?

A. Twenty-six days.

Q. At eight hours?

A. Yes, sir.

Q. You are now getting \$105.00 per month?

A. Yes, sir.

Q. And have been drawing that since 1936?

A. Yes, sir.

Q. Are you under civil service?

A. Yes, sir.

Q. You are a civil service employee of the government at this time?

A. Yes, sir.

173

Re-Direct Examination.

By Mr. Potter:

Q. Do you know of your own knowledge whether or not at that conference in Jackson attended by Mr. Jackson, who was the general chairman of the Grievance Committee of the I. C. R. R. Co. and company officials, at which the consolidated roster of 1927 was promulgated, Mr. McGee, the local chairman, and Mr. Dundes, the general chairman, attempted to sit in at that meeting? Do you know that of your own knowledge or not?

A. Yes, sir.

Q. Were they permitted to do it?

A. No, sir.

Q. Now, from the time that you went to work for the I. C. R. R. Company, at least up until the date of the consolidated roster, in the West Yard they were using the roster promulgated by whom?

A. The Switchmen's Union of North America, and the Alabama & Vicksburg Railroad Company.

Q. What rates of pay did you get and it was fixed by what contract?

A. Switchmen's Union of North America.

Q. Mr. Byrd asked you whether or not you took it up with the Switchmen's—no, with the Brotherhood of Railroad Trainmen, seeking to have your rights vindicated, and you stated that you did not. Please state whether or not it is a fact that every man you would have displaced was a member of the Brotherhood of Railroad
174 Trainmen and you were seeking under another contract?

A. Yes, sir.

Q. Now, you stated that this matter went clear to the Labor Board. Through what representative and under what contract were these matters brought before the Labor Board?

A. Switchmen's Union of North America.

Q. By the officials of the Switchmen's Union of North America?

A. Yes, sir, and the I. C. Railroad Company.

Re-Cross Examination.

By Mr. Byrd:

Q. You were a member of the Brotherhood of Railroad Trainmen in 1927?

A. Yes, sir.

Q. So any request or any action taken by the Brotherhood of Railroad Trainmen in 1927 would have been taken at your request as a member of the Union, as well as for the benefit of the other members of the Union?

By Mr. Potter:

We object.

175 By the Court:

Objection overruled.

A. Yes, sir.

Q. You state now that you never saw or heard of a written rule of the I. C. Railroad Company other than the

ones that you introduced in evidence. Did you ever hear of any unwritten rules of the I. C. Railroad Company?

A. No, sir.

Q. Did you ever hear anyone say that it was a rule of the I. C. Railroad Company that whenever a man filed a suit against it he was automatically discharged?

A. No, sir.

Q. You never heard that mentioned any time or place?

A. No, sir.

Q. When was the first you ever heard of that?

A. I never heard it.

Q. Didn't you read the pleadings in this case?

A. The first time I ever heard it was in the pleadings.

Q. Why did you ask Mr. Walker if he was discharging you for filing the lawsuit?

A. That is the only reason I knew he could discharge me.

Q. That was the only reason he could discharge you?

A. Yes, sir.

Q. In the transcript of the hearing that was held in Mr. Williams office by Mr. J. T. Walker, Superintendent, you asked Mr. Walker if he would give you a letter stating the reasons for your discharge. I want to ask you if he did give you any such letter?

176 A. Yes, sir.

Q. I now present to you a letter dated February 20, 1932 from Mr. J. F. Walker to you. I want to ask you if you ever received that letter?

A. Yes, sir.

Q. "Jackson, Mississippi, February 20, 1932. Mr. Earl Moore, Jackson, Mississippi. Dear Sir: Referring to my letter of February 15 and your letter to me dated February 17 asking for the hearing which was held in the Trainmaster T. K. Williams' office at 4:00 P. M., February 20, 1932. As I advised you in this meeting, the cause for you being dismissed from service was on account of unsatis-

factory employment. Yours truly, J. F. Walker, Superintendent."

A. Yes, sir.

177

A. E. McGHEE, witness for plaintiff, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Potter:

Q. You are employed at present by the I. C. Railroad Company as switchman?

A. Yes, sir.

Q. And have been so employed since the I. C. Railroad leased the Y. & M. V. Railroad Company?

A. Yes, sir.

Q. And prior to that time you were working for Alabama & Vicksburg Railroad Company and the Switchmen's Union of North America had a contract with the Alabama & Vicksburg Railroad Company?

A. Yes, sir.

Q. What position, if any, did you hold in the local lodge of the Switchmen's Union of North America?

A. I was the local chairman. The man who handled all the complaints.

Q. As local chairman was it your duty to take up in behalf of the members of your lodge any grievance that the individuals had with the management?

A. Yes, sir.

Q. Did that local lodge continue in existence after the lease of the Y. & M. V.?

178

A. For a short time.

Q. It continued in existence right on up until and after the promulgation of the consolidated roster?

A. Yes, sir.

Q. As local chairman did you receive any communication from the Railroad Company that the question of the consolidation of the two yards was to be heard in Jackson?

A. No, sir.

Q. Did you know that such was to occur?

A. Only by conversation with other men.

Q. Did you know Mr. Jackson?

A. Yes, sir.

Q. What position, if any, does he hold with the Brotherhood of Railroad Trainmen?

A. He was at that time general chairman of the I. C. System.

Q. Did you know that Mr. Jackson and other members of that general committee were in Jackson with a view to consolidating the two rosters in the Jackson yards at the time they did meet there?

A. That was the information I got.

Q. Where was that meeting had?

A. They held a meeting practically every day,—once and twice a day,—in the private car.

Q. On behalf of the members of the local lodge of the Switchmen's Union of North America, please tell the Court whether or not you attempted to sit in on that meeting?

A. I got in communication with my general
179 chairman and he instructed me to ask to sit in.

Q. Did you request to sit in?

A. As soon as I received the communication I went directly to the car and asked for Mr. Jackson. He came to the door and I told him who I was and I requested to sit in and he said unless I was a member of the Brotherhood of Railroad Trainmen I couldn't come in.

Q. You were not a member at that time?

A. No, sir.

Q. Do you remember the occasion when they consolidated the roster and published it?

A. Yes, sir.

Q. What steps in your official capacity as general chairman of the local lodge of the Switchmen's Union of North America did you take, and if you did take any steps, how soon after you saw the consolidated roster did you take them?

A. I immediately contacted the general yardmaster and he notified me that morning that we were not employees as far as any old age was concerned and to go to the Board and see where we stood. I asked Mr. Harding not to force that Board to place us there until I could hear from the Grand Lodge, and he said that was final and the least we had to say about it the better off we would be if we expected to stay there.

Q. That was the general yardmaster at Jackson, who has since died?

A. Yes, sir.

Q. After that who did you take it up with?

A. Mr. Ed McLauren. He was superintendent
180 at the time and he told me he had no authority to do anything with it at all. So we arranged a meeting with the Vice President, Mr. L. Canon, and myself and we had that meeting in New Orleans. He told us that as far as that was concerned, it was all over.

Q. Did you take it up with any other officials?

A. Mr. Patterson.

Q. Who was he?

A. General Manager of the I. C.

Q. Where?

A. Chicago.

Q. Did you get any relief there?

A. No, sir, he turned it down, so I carried it to the Board,—the Labor Board.

Q. Did you take that up with these various parties as an individual or as chairman of the local lodge?

A. As local representative I took it up with all the officials of the Railroad Company that I could contact and get anything from.

Q. At that time Mr. Moore was a member of the local lodge of the Switchmen's Union of North America?

A. Yes, sir.

Q. That was your duty under the constitution of the Switchmen's Union of North America?

A. Yes, sir.

181

Cross Examination.

By Mr. Byrd:

Q. How soon after this roster was promulgated was the objection made by you to Mr. Cannon?

A. The objection was made to me the same day.

Q. Made to you by the men, but I am talking about how soon after it was made by you to Mr. McLauren?

A. Well, I couldn't give the definite date.

Q. Have you any idea how soon it was?

A. I think it was about three weeks before I contacted him.

Q. Mr. McLauren referred you to Mr. Hevron, the New Orleans Superintendent?

A. No, Mr. McLauren said he had no authority.

Q. You went to Superintendent Hevron?

A. Yes, sir.

Q. He was general superintendent of the Southern lines and he saw you in New Orleans?

A. Yes, sir.

Q. Were you satisfied with what took place, or did you go to Mr. Patterson after Mr. Canon?

A. No, sir.

Q. You don't know what Mr. Canon did of your own knowledge?

A. Only from correspondence.

Q. You don't know what action was taken by the Labor Board on the matter?

A. Yes, sir, I know. I was posted on every move. The case never was heard.

182

Q. Was it a joint hearing at the request of the Brotherhood and the management, or was it an ex parte petition of the Brotherhood?

A. The members in Jackson had appealed through me to the Grand Lodge—

Q. I am talking about the case that was brought before the Labor Board. Was it brought at the joint request of the management and representatives of the Union, or simply at the request of the Union?

A. I couldn't answer that.

By Mr. Potter:

Plaintiff rests.

183 By Mr. Byrd:

We desire to make a motion to exclude the evidence offered by the plaintiff and ask that the Court enter a judgment for the defendant for the reason that the contract sued on is not shown to have been breached.

By the Court:

I am going to reserve ruling on that motion. If there had been no contract, then they can discharge him without cause, but as I understand the decision of the Supreme Court of Mississippi, there is a contract and he cannot be discharged except for cause as long as that contract is in existence. All the contract provides is how an employee who may have been discharged or suspended may proceed to cause himself to be reinstated, yet he also has the right to pursue another remedy, and if the discharge was without just cause, then there would be a breach of the contract, for which he could sue. That is the way I understand it now. I am not going to make a definite ruling, however, and will reserve ruling on the motion.

184 T. K. WILLIAMS, witness for Defendant, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Byrd:

Q. Where do you live?

A. Jackson, Mississippi.

Q. By whom are you employed?

A. I. C. Railroad Company.

Q. In what capacity?

A. Trainmaster.

Q. How long have you been trainmaster with the Illinois Central?

A. Fifteen years.

Q. How long have you been trainmaster at Jackson?

A. I had supervision over this territory in 1926.

Q. You were living at McComb at that time?

A. In February, 1930 I went on the South end and was relieved by Mr. Snyder and transferred back up there on September 15, 1931. I was about eighteen months out of this territory.

Q. As trainmaster, what, if anything, did you have to do with the Jackson, Mississippi yards of the Illinois Central Railroad?

A. The employees at Jackson were under my supervision. Bob Harding was general yardmaster and he had an assistant yardmaster under him.

Q. They reported to you?

185 A. Yes, sir.

Q. They were in immediate charge of the operation of the Yard in so far as the switchmen were concerned?

A. Yes, sir.

Q. You know the plaintiff, Earl Moore?

A. Yes, sir.

Q. How long have you known him?

A. Ever since we took the A. & V. over. July, 1926. I met all the men then.

Q. Did you receive any reports from Mr. Harding with reference to the work done by Mr. Moore?

A. Well, he would complain because he wouldn't work.

By Mr. Potter:

We object to that because it is hearsay. This man can't state what somebody else told him.

By the Court:

I will permit him to answer as to whether he got any reports. As to what they were, that will present another question.

Q. Did you or not get any reports from Mr. Harding as to Mr. Moore's work?

A. Yes, sir.

Q. Did those reports come from Mr. Harding indicating that Mr. Moore was an efficient employee or a non-efficient employee?

By Mr. Potter:

We object.

By the Court:

I will sustain the objection unless it is in writing.

By Mr. Byrd:

They are not in writing.

By the Court:

I will sustain the objection.

Q. State whether at any time you had any complaint from Mr. Harding or anyone else as to Mr. Moore laying off from his job and not working when the work was available?

By Mr. Potter:

We object.

By the Court:

I am going to let him answer that as to whether he received any reports, but as to what were in those reports, it would have no probative force.

A. I did.

187 By Mr. Potter:

As I understand the Court's ruling, it is just that he received the report, and anything else will be excluded?

By the Court:

Yes, sir.

Q. As a trainmaster with supervision of the Jackson, Mississippi yard was it or not your duty to keep in contact with the operations in the yard and to inform yourself as to the efficiency of the various switchmen and yardmen employed in the Jackson yard?

A. I did that.

Q. Did you do that with reference to Earl Moore?

A. I observed his work when he worked.

Q. Did you observe whether or not he worked regularly?

A. He did not.

Q. Do you know why he didn't work regularly?

A. No, sir.

Q. Do you know whether or not he was sick at the times when he wasn't working regularly?

A. I do not.

Q. At the time that he was not working regularly, when he would lay off and come back, what was his appearance as to whether he was sick or well?

A. Well, I assumed that he was well, because if he was off sick he would have to get a leave of absence from me and he didn't have that.

188 By Mr. Potter:

We object.

By the Court:

I will sustain the objection as to what he assumed.

Q. Were you there at Jackson when the A. & V. Railroad Company was leased by the I. C.?

A. I was.

Q. Were you there when the consolidated roster was made for the two yards?

A. I was.

Q. Did Mr. Moore, or anyone for him, make any complaint to you about the publication of that roster?

A. They did not.

Q. Were you the proper officer to whom the complaint should be made?

A. I was.

Q. Did Mr. Moore continue to work under that roster as published?

A. Yes, sir.

Q. How long did he work under it?

A. Before we received the complaint about five and a half years.

Q. What was the first you knew of his complaint?

A. I don't know that he ever complained to me about the roster.

Q. Do you know whether he did or didn't complain to you?

189 A. He did not.

Q. When did you first hear that he was complaining of the roster? Was it when the suit was filed or when?

A. When I had information about the suit. I don't know at that time that I knew what the suit was about, but I heard he indicated that it was something pertaining to his seniority and he went to Chicago and came back and told me something about going to get his full seniority and I said to him "I don't see how you can do that under the contract with the employees made between the company and the switchmen, after a lapse of five years after the meeting the Railroad management had with the Brotherhood of Railway Trainmen."

Q. State whether or not the service of Earl Moore was satisfactory to the I. C. Railroad Company during the time that he was employed?

By Mr. Potter:

I would like for the Court to advise the witness that he can testify only from what he knows of his own knowledge.

By the Court:

Yes, no witness can testify to things he does not know of his own knowledge.

Q. Was he or not a satisfactory employee?

A. No.

190 Q. How long have you been working for the I. C. Railroad Company?

A. Thirty-six years.

Q. Do you know whether or not it is a rule of the I. C. Railroad Company that a man working for them who files suit against them is discharged?

A. That is the policy of the Railroad.

Q. How long has it been the policy of the Railroad?

A. Ever since I have been working for them.

By Mr. Potter:

Under the last answer we move the Court to exclude the question of policy from the record.

By the Court:

I will overrule the motion and hear the matter out on argument.

Q. Is it or not a rule of the I. C. Railroad Company, or was it a rule at the time Moore filed this suit?

A. It was.

Q. How did you find out what that rule was?

A. Well, it just always has been my understanding that if you sued the Railroad you lost your job.

Q. That has been the policy in the past?

A. Always.

Q. Do you know of instances where an employee has sued the Railroad and not been discharged?
191

A. No, sir, I do not.

Q. Mr. Moore, as shown by the record, was off for considerable time in 1931 and 1932. I believe he was discharged in 1933. Do you know whether or not he had leave of absence during that time or not?

A. He did not the first six months.

Q. Did he have it for the second six months?

A. He got that through the hospital department and not through me.

Q. Did he ever request it of you?

A. No, sir.

Q. Do you know if one was given him or not?

A. The second one I say the doctor did.

Q. What was the date of that second leave of absence?

A. July 27, 1932.

Q. For how long a period was it?

A. Six months.

Q. That would make it expire when?

A. January 27, 1933.

Q. Did Earl Moore present himself for work or re-employment to you on or prior to January 27, 1933?

A. Yes, sir, he came to see me and asked about a switchtender job.

Q. Is that the letter where Mr. Moore said he was physically unable to perform the duties as switchman?
192

A. Yes, sir.

Q. I am talking about when, with reference to the leave of absence and January 27, 1933 did he present himself to go back to work as switchman?

A. On February 2, 1933,—five days after his leave expired.

Q. Has the I. C. Railroad any rule with reference to leaves of absence?

A. They have.

Q. Are those rules in writing?

A. Yes, sir.

Q. What are they?

A. In so far as the trainmaster is concerned, is that what you want?

Q. Yes.

A. The trainmasters are permitted to grant a leave of absence up to six months to an employee. After that he should report to the I. C. Hospital in New Orleans. If they find him in such physical condition as to warrant further leave, they will recommend same to Dr. Dowden, who in turn recommends additional leave to the superintendent. When granting leave we send a copy of the letter to the superintendent of the department where the service record is posted and it is carried on the pay roll with notation as to leave. Those are my instructions.

Q. What rules do they have governing the men? The rules that are given to the men?

A. The contract between the employees and
193 the Railroad,—that is, between the Switchmen and the Railroad, providing that they only be given 90 days unless he is sick or serving on a committee.

Q. He did have a leave from July 27, 1932?

A. Yes, sir.

Q. And prior to that he had no leave of absence at all?

A. No, sir.

Q. And after he returned to work the six months had expired?

A. Yes, sir.

Q. That is provided by Article 14, Section C of the contract between the Switchmen and the Brotherhood of Railroad Trainmen?

A. That is a fact.

Cross Examination.

By Mr. Potter:

Q. I assume you want to be perfectly fair about this matter. Doesn't Mr. Moore efficiency record furnished by the Railroad in response to interrogatories at the first trial show that Mr. Moore was granted a further leave of absence on August 3, 1932?

A. By the Hospital department.

Q. That leave of absence would not expire until February 3, 1933?

A. The leave dates from January 27, 1932.

Q. And it was five days after he reported back
194 from his leave of absence?

A. For duty as switchman.

Q. In that time he was not called, was he?

A. Well, we had ample men. It was not necessary. He is supposed to report when he is ready for duty. We don't call switchmen when they are off.

Q. Was there any man during that five days that had a lower number that was called?

A. We don't call switchmen. They report to the Board at 7 o'clock in the morning and receive the work that is available and take their places in accordance with seniority.

Q. Did any man who had a number lower than Moore work between the 27th day of January and the 2nd day of February, 1933?

A. That would have to be checked by the payroll.

Q. You don't know of any such man?

A. No, I wouldn't know.

By the Court:

Before we go any further, that leave of absence was July 27, 1932.

Q. You stated that you did not know any person or any employee who had ever filed a lawsuit against the Railroad who was not discharged. I want to ask you
195 this question. Who do you know that was ever fired for filing a lawsuit up until the time that Mr. Moore was discharged?

A. I had never known of any bringing suit.

Q. You have a printed book of rules, do you not?

A. Yes, sir.

Q. The Railroad Company promulgated rules and there is a rule book that has been introduced in evidence as Exhibit "H" to the testimony of Mr. Moore?

A. It has his name, but it was furnished to Mr. Gordon.

Q. But this is the book of rules?

A. Yes, sir.

Q. There is no rule in that printed book of rules that any employee filing a lawsuit would be discharged, is there?

A. No, sir.

Q. Those rules are to operate the railroad by and not to discharge the employees?

A. Yes, sir.

Q. You stated that Mr. Moore was an unsatisfactory employee. Of your own personal knowledge why do you state that?

A. After taking the A. & V. Railroad over, those men being strangers to me and they began working in the I. C. Yard, I naturally would observe their work when I was around Jackson, which was two or three days a week. Bob Harding, now deceased, was general yardmaster and would point out the different ones and he has complained of this fellow working so slow and remarked—

196 : By Mr. Potter:

We object to what Mr. Harding said.

By the Court:

Objection sustained.

A. He would move rather slow going to switch and would slow up the work.

Q. How many times have you seen Mr. Moore moving slow going to switch and slowing up the work?

A. I couldn't answer that. Most all the time I ever saw him work he worked rather slow.

Q. Did you see him right from the beginning at intervals and on up to the time that he was discharged moving slowly?

A. At intervals.

Q. Was there anything else that you observed and know of your own knowledge other than moving slowly?

A. He wouldn't work when work was available.

Q. There were plenty of men on the board at that time to work?

By Mr. Byrd:

We object.

By the Court:

Objection sustained.

197 By Mr. Potter:

I want to show that there were men willing to take Mr. Moore's place on the extra board.

By the Court:

I don't think that would be material.

Q. Did that start from the beginning?

A. I beg your pardon.

Q. Did that conduct on the part of Moore start from the beginning of the time I. C. took over the job,—not working regularly?

A. I don't know anything about his practice when he worked for A. & V.

Q. I said from the time I. C. took over the yard?

A. He didn't work regularly.

Q. The Railroad Company knew that from 1926 until 1933 that he wasn't working regularly?

A. The last day he worked was January 3, 1932.

Q. They knew that during that whole period?

A. Yes, sir.

Q. They knew he was moving slowly going to the switch job during that whole period?

A. Yes, sir.

Q. But they didn't fire him until after he filed this lawsuit, did they?

A. The Railroad Company does everything it can to keep from firing their employees. It is our policy to put up with them and to educate them to be efficient and good employees and citizens. We are not picayunish with them. There are lots of things we might fire them for, but we don't do that.

Q. I said, notwithstanding that knowledge during that period of five years Moore was not discharged until a few months after he filed this lawsuit, was he?

A. He was fired February 15. I can't say when he filed the lawsuit.

Q. As a matter of fact, don't you know that he was discharged because he filed the lawsuit?

A. The Superintendent dismissed him.

By Mr. Byrd:

It is admitted in the pleadings that that is one of the reasons he was discharged.

Q. There is no regulation under the contract requiring you to give a switchman of longer seniority than another switchman the job as engineer foreman unless that man deserves the promotion, is there?

A. They take their turn. I think all of our men were promoted to engineer foremen and worked in accordance with seniority. The A. & V. didn't do that. They picked out different men. The I. C. gave each man his turn.

Q. In 1930, and sometime after February 13, 199 you yourself promoted Mr. Moore to the job as engineer foreman, didn't you?

A. He came over from A. & V. as helper and I don't recall. I would have to look at the records to see whether or not I examined him to promote him as engineer foreman.

Q. Referring to the efficiency record, he was examined for the job of engineer foreman on February 13, 1930, was he not?

A. Not by me.

Q. He was examined?

A. The record shows that.

Q. If he was promoted to the job of engineer foreman, it was done, if not by you, at least with your knowledge, consent and acquiescence?

A. It was not. I was not trainmaster there at that period. Mr. Snyder was, and he evidently examined Mr. Moore and not me.

Q. In February, 1930 you were not trainmaster there?

A. I came back in 1931. I would have to look at the records to be positive.

200

G. G. DOWDALL, witness for defendant, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Byrd:

Q. Where do you live?

A. Chicago.

Q. By whom are you employed?

A. I. C. Railroad Company.

Q. Do you have charge of the I. C. Railroad Company Hospital in Chicago?

A. Yes, sir.

Q. How long have you had charge of it?

A. Since 1916.

Q. Do you know the complainant in this case, Earl Moore?

A. Yes, sir.

Q. Was he ever a patient in the I. C. Hospital in Chicago?

A. Yes, sir.

Q. When?

A. August 5, 1931.

Q. To when?

A. Just August 5, 1931.

Q. When was he next a patient?

A. January 5, 1932.

Q. How long was he there then?

A. January 9, 1932.

Q. Was he discharged from the hospital on
201 January 9, 1932?

A. Yes, sir.

Q. What was his physical condition as to whether he was able to return to work at that time?

By Mr. Potter:

We object to the doctor testifying because the relation of physician and patient exists.

By the Court:

I will sustain the objection.

Q. When did he next return, if he did return?

A. July 27, 1932.

Q. Now, on July 27, 1932, what if anything was done by you with reference to a leave of absence for Mr. Moore?

A. I recommended that he be granted a six months leave of absence on account of his physical condition.

Q. Do you know whether or not, of your own knowledge, that was granted?

A. I know it was granted.

Q. Was he back in the hospital any more?

A. I think that was the last time he was in the Chicago hospital.

Q. Prior to July 27, 1932 had you seen Mr. Moore?

A. I saw him when he was at the Chicago hospital at the previous admittance.

Q. Did you or not give him a discharge or give a letter to anyone in regard to giving him a discharge?

202 A medical discharge?

A. January 9, 1932. He was given an order to Dr. Womach and Dr. Womach was directed to return him to work.

Q. What position does he occupy with the I. C. Railroad Company?

A. On our consulting staff at Jackson and had been taking care of Mr. Moore.

Q. At the time that you wrote this letter to Dr. Womach directing that he be discharged as able to go to work, what was Mr. Moore's physical condition?

By Mr. Potter:

We object to this because the relation of physician and patient exists.

By the Court:

If he knows it by virtue of his examination and treatment of him as a doctor, I sustain it. If he knows it independent of that, he can testify.

Q. Do you know other than by your treatment what his physical condition was?

A. I know by the examination we made at Chicago Hospital what his condition was.

Q. Did you know it independent of that?

A. I did not examine him myself.

Q. Did you see him?

203 A. Yes, sir, I saw him.

Q. You didn't examine him?

A. No.

Q. From what you saw of him, what would you say as to whether he was in condition to go back to work?

A. He was able to go back to work in my opinion.

204 F. A. TYSON, witness for defendant, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Byrd:

Q. Where do you live?

A. Memphis.

Q. By whom are you employed?

A. I. C. System.

Q. In what capacity?

A. Timekeeper.

Q. As such, what, if anything, do you have to do with the records of the I. C. Railroad Company showing the time made and the amount of money paid to switchmen in the Jackson, Mississippi yard?

A. I have charge of that.

Q. I hand you a statement which I would like for you to examine and tell me what it is?

A. It is a statement of the time performed by switchman Earl Moore from November, 1926 through February, 1932.

Q. 1932 or 1933?

A. 1932.

Q. Where did you get the information from which you made up this statement?

A. From the time books prepared each pay roll period.

Q. Is this statement correct?

205 A. It is true to the best of my knowledge.

Q. Will you make that an exhibit to your testimony?

A. Yes, sir.

By Mr. Byrd:

We desire to introduce this statement as Exhibit "A" to the testimony of Mr. Tyson.

BLANK PAGE

DEFENDANT'S EXHIBIT "A"—Tyson.

Statement of Time Made and Wages Earned by Earl Moore, Employed as Switchman by IC RR at Jackson, Miss.,
November 11, 1926, to Dec. 31, 1932, Incl.

		1926		1927		1928		1929		1930		1931		1932	
		Days	Amount	Days	Amount	Days	Amount	Days	Amount	Days	Amount	Days	Amount	Days	Amount
Jan.	A			9	\$56.71	..	....	11	\$72.82	7	\$46.59	..	....	1	\$ 7.61
	B			2	13.47	..	....	11	73.07	6	45.67	..	....	6	42.94
Feb.	A			1	6.16	..	....			8	52.96	4	28.09	..	....
	B			1	6.16	..	....	7	46.34	12	80.18	2	13.49	..	....
Mar.	A			6	39.04	..	....	15	104.63	14	97.56	3	19.86	..	....
	B			13	83.20	..	....	12	80.68	15	99.92	15	100.66	..	....
Apr.	A			15	95.05	..	....	15	99.30	7	47.58	5	33.62	..	....
	B			10	62.29	2	13.24	14	93.67	14	103.10	5	33.62	..	....
May	A			10	63.56	15	99.82	15	101.21	14	93.05	4	27.47	..	....
	B			..	....	16	106.17	14	96.92	12	81.18	7	46.34	..	....
Jun.	A			1	6.16	10	66.45	13	87.10	14	93.18	5	33.97	..	....
	B			8	50.20	7	47.36	12	79.44	7	46.96	1	6.62	..	....
Jul.	A			1	6.62	4	26.85	13	87.30	13	86.56	3	20.11	..	....
	B			2	13.24	1	6.62	11	73.32	10	77.66	..	....	..	....
Aug.	A			10	70.54	1	6.62	1	6.62	..	....	..	....	..	....
	B			6	41.46	5	33.47	7	46.34	4	27.97	..	....	..	....
Sep.	A			12	82.66	4	26.48	4	29.08	9	60.60	..	....	..	....
	B			7	50.93	14	94.17	12	90.54	11	74.93	..	....	..	....
Oct.	A			13	86.56	7	47.08	12	83.06	3	20.11	..	....	..	....
	B			1	6.62	4	29.83	15	111.88	7	46.34	..	....	..	....
Nov.	A			3	19.86	10	66.82	8	58.94	1	6.62	..	....	..	....
	B	1	\$6.16	5	33.10	5	33.10	..	....	..	....	..	....	..	....
Dec.	A	1	6.16	12	80.46	12	80.31	..	{Short}	..	....	..	....	..	....
	B	..	....	2	13.76	3	20.60	..	{Oct. }	1	6.62	..	....	..	....
		2	\$12.32	150	\$987.81	120	804.99	222	\$1,522.26	189	\$1,295.34	54	\$363.85	7	\$50.55

207 Q. Now, what is that document I hand you?

A. That is a statement of time performed by switchman H. H. Cutler for the period January 1, 1933 through October 15, 1938.

Q. Where did you get the information from which you made up that statement?

A. From the time books prepared from each payroll period.

Q. The I. C. Railroad books?

A. Yes, sir.

Q. Is that statement correct?

A. It is.

By Mr. Byrd:

We desire to offer this statement in evidence as EXHIBIT "B" to the testimony of Mr. Tyson.

(This Exhibit has already been copied as Exhibit "J" to the testimony of Moore, page 122 hereof). (This Exhibit "B" to Tyson, however, has a figure thereon in green ink, evidently the total, of 10764.24).

Q. What is this document I hand you?

A. This is a statement of the time earned by switchman H. H. Cutler from November, 1926 through December, 1932.

Q. Did you secure that information from the same source?

A. Yes, sir.

Q. Is that correct?

A. It is.

By Mr. Byrd:

We desire to introduce this statement as Exhibit "C" to the testimony of Mr. Tyson.

BLANK PAGE

DEFENDANT'S EXHIBIT "C"—Tyson.

Statement of Time Made and Wages Earned by H. H. Cutler, Employed as Switchman by IC RR at Jackson, Miss., Nov. 11, 1926 to Dec. 31, 1932, Inc.

		1926		1927		1928		1929		1930		1931		1932	
		Days	Amount	Days	Amount	Days	Amount	Days	Amount	Days	Amount	Days	Amount	Days	Amount
Jan.	A			10	88.31	10	71.40	15	108.32	11	78.94	13	93.07	..	.....
	B			13	112.34	14	99.96	12	84.64	9	64.04	12	84.78	7	47.63
Feb.	A			13	118.32	13	92.80	14	102.14	13	95.10	14	96.72	1	5.96
	B			10	89.18	11	78.81	13	92.33	12	90.92	12	84.39	1	6.07
Mar.	A			12	104.95	13	92.82	13	96.04	15	111.69	11	74.08	9	54.09
	B			14	120.85	13	95.45	16	125.78	14	106.54	11	71.68	12	72.88
Apr.	A			13	106.74	11	79.48	13	120.02	13	104.34	14	97.85	4	24.97
	B			12	101.47	13	94.16	15	111.52	13	101.93	12	83.78	3	18.21
May	A			12	99.85	13	94.03	14	101.30	13	93.22	12	83.38	2	11.92
	B			10	80.10	13	94.70	10	74.08	3 ³ / ₄	26.93	15	100.59	1	7.18
Jun.	A			11	95.57	11	81.62	14	100.38	7	46.86	9	61.32		
	B			13	104.62	13	94.83	13	94.31	14	95.56	8	53.08		
Jul.	A			12	103.23	10	72.87	7	49.98	14	96.45	14	96.50		
	B			11	90.60	12	86.62	16	114.54	15	108.60	11	75.94		
Aug.	A			12	96.00	14	99.96	12	87.96	15	103.07	7	48.97		
	B			13	112.25	14	100.50	14	100.90	16	112.41	6	50.16		
Sep.	A			12	111.41	16	114.39	13	95.67	15	112.95	4	27.00		
	B			11	98.64	14	101.97	15	111.94	15	113.13	13	88.27		
Oct.	A			12	86.88	12 ⁵ / ₈	94.83	15	114.90	14	105.49	15	106.98	14	88.96
	B			11	78.54	16	115.61	15	129.34	16	119.57	13	103.94	12	73.79
Nov.	A	4	36.52	12	86.13	14	100.78	10 ¹ / ₂	93.06	14	100.96	12	91.98	14	84.82
	B	12	124.50	11	79.34	15	107.68	12	88.23	15	111.25	10	69.98	12	73.41
Dec.	A	12	116.16	13	93.49	14	101.20	12	88.09	14	102.79	10	66.32	11	69.69
	B	12	112.05	12	86.48	11	79.34	11	83.36	4	29.35	5	33.87	4	24.39
Total		40	389.23	285	2345.29	310	2245.81	314	2368.83	304	2232.09	263	1844.63	107	663.97

209

Cross Examination.

By Mr. Potter:

Q. Are you familiar with the seniority roster in Jackson prior to February 15, 1933?

A. Yes, sir.

Q. You are familiar with the contract with the switchmen?

A. No, sir.

210

T. S. JACKSON, witness for defendant, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Byrd:

Q. Where do you live?

A. At Lincolnshire, Illinois,—a suburb of Chicago.

Q. What, if any, connection do you have with the Brotherhood of Railroad Trainmen?

A. Chairman of the grievance committee for the Brotherhood.

Q. How long have you held that position?

A. Since January, 1920.

Q. Are you the same T. S. Jackson that signed the schedule of wages and rules which is in evidence in this case?

A. I have signed every schedule of wages and rules since 1920.

Q. This is the document we are talking about.

A. Yes, sir, I signed that.

Q. In the negotiations leading up to the making of that contract, did you or not represent the Brotherhood of Railroad Trainmen?

A. Yes, sir.

Q. How long have you been familiar with the operations of the Illinois Central Railroad Company?

A. I went to work in September, 1906 in the Kentucky Division and was elected local chairman for the Trainmen in that Division in 1909 and took office January, 1910 and have been a member of the Committee since that time.

211 Q. During the time that you have worked for the I. C. Railroad Company and the time when you were connected with the Brotherhood of Railroad Trainmen, state, if you know, what the rule of the I. C. Railroad Company has been with reference to the discharge of employees who entered suit against that Railroad?

By Mr. Potter:

We have heretofore objected to this line of questioning. Is there any necessity for renewing our objection?

By the Court:

It might be best to raise your objections as we go along.

By Mr. Potter:

We object to this testimony for the reason that it is an attempt on the part of the defendant to amplify and vary the terms of the written contract.

7 By the Court:

I will overrule the objection.

Q. You say you are familiar with that rule?

A. It has been the policy of the I. C. Railroad Company to discharge its employees who brought suit.

Q. How long has that been its policy?

A. Since my connection with the company in 1906.

Q. Did you know that was its policy when this contract that has been made a part of the evidence was entered into?

A. To the same extent that I am today.

212 By Mr. Potter:

We move to exclude the testimony in regard to all that.

By the Court:

I will overrule the objection.

Q. I believe you were representing the Brotherhood of Railroad Trainmen in Jackson when the management agreed with the Brotherhood of Railroad Trainmen on the consolidated seniority roster in the Jackson, Mississippi Yard. Were you or not? In 1926, I believe it was.

A. The reason I am hesitating to answer that is there were two consolidations, one of the G. & S. I. and one of the A. & V.

Q. Were you present when Mr. Earl Moore was given a place on the consolidated roster?

A. Yes, sir.

Q. Who took part in that conference?

A. We drafted one in the general committee in 1926 and on November 12 we met Mr. Hevron, who had authority to speak for the general manager and reached an agreement on the subject.

Q. Why were you present representing the men?

A. For the reason that our Brotherhood holds a contract and has held a contract since 1890 with
213 the I. C. Railroad for the men employed in the train and yard service.

Q. Does that include the Jackson, Mississippi, yards?

A. Yes, sir.

Q. At that time do you know whether or not what was formerly the A. & V. Yard, the West yard in Jackson,

had been abolished in so far as operation of the work was concerned?

A. It had been at that time to a certain extent. In other words, there was an intermingling of work between the old A. & V. and I. C. Jackson, Mississippi, yards.

Q. What about the meeting where you agreed on this consolidated roster? What started that meeting?

A. The insistence of the Jackson, Mississippi, I. C. Yardmen that something should be done to arrange an agreement in connection with the joint work.

Q. At the meeting, as I understand it, it was agreed that the two oldest A. & V. men would be given their actual seniority on the list and that the remainder of the A. & V. switchmen would be put in on the roster on the ratio of one A. & V. man to five I. C. men?

A. No, I think the agreement reached was that the two senior A. & V. men would be given their original service and placed on the I. C. list as of the day and date they entered service and that the two junior A. & V. men would be placed at the foot of the list, and that the balance of the A. & V. men would be put on at the ratio of four to one.

214 Q. When they put these A. & V. men on, what effect did it have on the I. C. men that were lower than the men who were put in with respect to the I. C. men's position on the seniority roster?

A. It naturally reduced those of the I. C. men that were effected by the roster,—those that were effected by the merger.

Q. As representative of the Brotherhood of Railroad Trainmen you agreed to that on behalf of the Trainmen, as I understand it?

A. My full general committee agreed to it.

Q. You mean you who were there representing the Trainmen?

A. That is correct.

Q. Was there or not at that time machinery provided for in the contract between the Brotherhood and the Railroad any by-laws and constitution for the Brotherhood of Railroad Trainmen whereby that action could be challenged?

A. Oh, yes.

Q. Was it challenged by any A. & V. switchmen?

A. Not to my knowledge.

Q. When was the first time that you ever heard Mr. Moore was complaining about his place on the roster?

A. The first intimation I had of his complaint was when I received a letter from him in December, 1937, some five years later.

Q. That was five years and one month after the consolidated roster had gone into effect?

A. Yes, sir.

215 Q. At that time did you go into the matter with him?

A. I replied to Mr. Moore's letter when he wrote me in connection with it.

Q. Did you arrange to go into it for any reason?

A. I cited him the law of our organization—

By Mr. Potter:

We object to the contents of any letter.

By the Court:

Objection sustained.

Q. I want to know if you declined to go into it for any reason?

A. I did because of our law.

By Mr. Potter:

We object.

By the Court:

I will overrule the objection.

Q. Was Mr. Moore at that time a member of the Brotherhood of Railroad Trainmen?

A. He was.

Q. Is he a member of it today?

A. I couldn't say.

Q. Do you know whether or not he has ever
216 been dropped from the rolls?

A. Yes, I know he has been in and out.

Q. You don't know whether he is a member of the organization today or not?

A. No.

Q. You do know that when he wrote that letter he was a member of the organization?

A. That is correct.

Q. Do you know how soon after this consolidated roster was put into effect he joined the Brotherhood of Railroad Trainmen?

A. Not without going to the records.

Q. Mr. Moore was admitted to the lodge in Jackson on February 6, 1921?

A. Yes, and he was expelled for non-payment of dues on July 1, 1924. He was re-admitted on June 13, 1930, and expelled on January 1, 1931, and re-admitted February 27, 1931.

Q. Is that the last record you have?

A. He was expelled on January 1, 1933. That is the last record I have.

Q. Back to this proposition when Mr. Moore complained to you some five years and one month after the seniority roster was agreed upon, do you know whether or not Mr. Moore appealed to any other officers of the Brotherhood of Railroad Trainmen?

217 A. He appealed from my decision to the President of the organization, Mr. A. F. Whitney. Mr.

Whitney gave him the same answer that I gave, in substance.

Q. When was the first time you ever heard of any dissatisfaction on the part of Mr. Moore in regard to this list here?

A. The next I heard was when I was informed that Mr. Moore had brought suit.

Q. Did you or not, as an officer of the Brotherhood of Railroad Trainmen, advise him to bring the suit?

A. I did not.

By Mr. Potter:

We object.

By the Court:

I will sustain the objection.

Q. Did he or not make any inquiry of you as to the advisability of filing suit?

By Mr. Potter:

We object.

By the Court:

Objection overruled.

218 A. He did not.

Q. With whom is the power vested to take up with the management of the Railroad the grievances in regard to seniority lists and the places of the individual men on the list?

A. First with the local committee of local officers, and if not satisfied with the disposal of it there, it is then referred to my office to be handled by the general office.

Q. Was Mr. Moore or anyone acting for him ever requested to have you, as officer of the Brotherhood of Railroad Trainmen to take up with the Railroad Company

this question of seniority other than this letter you are talking about five years later?

A. No.

Cross Examination.

By Mr. Potter:

Q. Mr. Moore was expelled for non-payment of dues in July, 1924?

A. Yes, sir.

Q. And when was he re-admitted?

A. Expelled July 1, 1924, and re-admitted June 13, 1930.

Q. And then expelled again for non-payment?

A. January 1, 1931.

Q. That is the last record you have of it?

A. No, he was re-admitted February 27, 1931, and was expelled January 1, 1933.

Q. Now, at the time of the consolidation of this roster in Jackson in 1926, none of the former employees, switchmen of the Alabama & Vicksburg Railway Company, were members of the Brotherhood of Railroad Trainmen, were they?

A. Yes, some of them were members.

Q. All of them belonged to the Switchmen's Union of North America, so far as you know?

A. No, I don't think they did.

Q. The Switchmen's Union of North America, however, had a contract with the Alabama & Vicksburg Railway Company, didn't they?

A. I would say yes.

Q. Now, did not Mr. A. E. McGhee represent the former employees of the Alabama & Vicksburg Railway Company, which employees were then working for the I. C. Railroad Company in the so-called West Yard, and did he not seek admittance to that conference out of which the consolidated roster grew?

A. I couldn't answer that.

Q. You know Mr. McGhee, don't you?

A. Yes, sir.

Q. Didn't you deny him admission on the ground that he was not a member of the Brotherhood of Railroad Trainmen?

A. I couldn't answer that yes or no, but if he was not a member of the Brotherhood of Railroad Trainmen, he would not have been admitted.

Q. Even though those men's fate was involved in that meeting?

A. He would not have been admitted.

Q. Those men's fate was involved in that meeting?

A. The word "fate" covers a lot of territory.

220 Q. I mean their position on the seniority roster?

A. Their position on the seniority roster was determined by the I. C. General Committee.

Q. At that time and place?

A. Yes, that is right.

Q. All right, now, you stated, I believe, that the two oldest men on the A. & V. roster were given their actual seniority and the last two men were put at the foot of the list, and the remainder were put in on the basis of four to one?

A. That is correct.

Q. As a matter of fact, were not the first twenty-five, with the exception of Tobias Dolittle and one man from the G. & S. I. Yard, all I. C. men and weren't those twenty-five men all given their actual seniority?

A. I would have to look at the records.

Q. Isn't Hampton the first man on the consolidated roster after Tobias Dolittle that worked formerly for A. & V.?

A. Will you please ask that question again?

Q. Isn't Hampton, No. 26 on the consolidated roster, the first A. & V. man with the exception of Tobias Dolittle?

A. Well, J. G. Hampton, A. & V. yardman, third on the A. & V. list, was placed between J. N. Varnado and R. N. Steel.

Q. He is numbered 26 is he not?

A. I can't tell you about that.

Q. You wouldn't deny that he is No. 26 on
221 that list?

A. Neither will I say yes, because I don't know.

Q. You did state they were put in on the basis of four to one following Dolittle?

A. With the exception of one place and that was J. N. Varnado, who at that time was regular yardmaster and was not considered a young man.

Q. What was the number of the first A. & V. man on that seniority list after Tobias Dolittle?

A. My list isn't numbered and that is rather hard for me to determine.

By Mr. Byrd:

We will admit that on the seniority list of yardmen at Jackson, Mississippi, on November 13, 1926, J. G. Hampton was number 27, and he was the first man with the exception of Tobias Dolittle that was formerly employed by A. & V. on that list.

Q. Are you familiar with the declaration of policy of the Brotherhood of Railroad Trainmen in the matter of consolidation of yards?

A. I don't know what you mean by declaration of policy.

Q. In the triangle meeting at Houston didn't the general convention promulgate what was called a declaration of policy with regard to the consolidation of yards?

222 A. Where?

Q. At the Houston meeting?

A. No, sir.

Q. At any time prior to 1931?

A. Yes, sir.

Q. When and where?

A. 1925 in Cleveland.

Q. That declaration of policy was a cut in on the basis of engine hours?

A. I would have to read it to answer that.

Q. Will you please read it?

A. I will be glad to.

Q. In the consolidation of two yards of the same railroad did the Brotherhood have any different policy from that?

A. The general committee on the line effected would have a right to adopt their own policies.

Q. They didn't adopt a policy on the basis of engine hours in this case, did they?

A. Yes, sir.

Q. How many engine hours were the men in the West yard numbering at the time of the merger and for some time, long enough to make a consistent basis, prior to the consolidated roster?

A. I couldn't give you exactly, because I don't have those figures, but they were taken into consideration and the method of merging those two yards, if you please, was based on the engine hours, as well as the number of men involved and the men from the A. & V. were given their full quota of work in accordance therewith.

Q. In other words, they were given places on the I. C. Jackson yardmen's list to the extent that they would hold the same kind of job at the Jackson yard that they held in the A. & V. yard,—that is the two senior men that were given their seniority position, and the third man, Hampton, I think his name is, could hold a daylight job at the time, and so on down the list? And the reason the two men at the bottom of the list were placed there is

that they were so far down on the A. & V. list that they had not worked for a considerable period of time.

A. Yes, sir.

Q. At the time was not the I. C.—at the time the I. C. took over the West Yard had not the A. & V. for a long time prior to the consolidation operated four engines?

A. The facts are that when the merger started, as I recall it, in June, 1926, the A. & V. men started coming over to the I. C. and performing a certain portion of the work there and the I. C. men were raising the dickens with me and the management because we didn't get together and make a settlement on it.

Q. I am asking if you know as a matter of fact, and if you don't won't you say so, that the A. & V. for a number of years prior to the lease of the I. C. Railroad becoming effective, operated four engines in the so-called West Yard?

A. We only went back for a period of one year and I couldn't answer that.

224 Q. Well, for a period of one year?

A. I don't think they did.

Q. Will you deny that they were working four engines?

A. Yes, sir. Regularly.

Q. And at the same time and for the same period were not the I. C. Railroad Company operating in the North Yard 12 engines?

A. I couldn't answer that without going to the records.

Q. Would you deny that they were operating four engines in the West Yard?

A. In answer to that question I will say that the total number of engines hours was gone into for a period of 12 months prior to the consolidation and we didn't go into the number of engines working daily because they would vary. But we took the total number of engine hours worked in each yard for a period of 12 months prior to the merger.

Q. I ask you do you now deny that there were regularly working in the West yard during the time the I. C. had it and for the period that you went into when the A. & V. had it, four engines in the West Yard?

A. I absolutely deny it and you can't find it.

Re-Direct Examination.

By Mr. Byrd:

Q. In making this consolidated roster I believe you stated it would have an effect on the I. C. men
225 already working in the I. C. yard in that whenever an A. & V. man was put in it would reduce those men below him one number at least on the roster?

A. It reduced the first man one and the second man two and so on down.

Q. It would have that effect on the I. C. men?

A. That is correct. In fact, we wouldn't have had to take any A. & V. switchmen over at all for the reason that the work was coming over to the I. C. Yard and not being performed in the A. & V. Yards.

Re-Cross Examination.


By Mr. Potter:

Q. Do you know any switchman or employee that the Illinois Central Railroad has discharged for filing a lawsuit against it?

A. I don't know of any switchman, but I know of a fireman and a trainman.

Q. Your experience covers the entire system from one end to the other?

A. Yes, sir.



226

S. HESTER, witness for defendant, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Byrd:

Q. Who are you working for?

A. Illinois Railroad Company.

Q. How long have you been working for them?

A. About thirty years.

Q. In what capacity?

A. Switchman and engine foreman and yardmaster.

Q. Whereabouts?

A. In Jackson.

Q. As engine foreman and assistant yardmaster, what, if anything did you have to do with the placing of the men or calling men as engine foremen?

A. When I was yardmaster I placed the switchmen and engine foremen.

Q. Did you ever have occasion to place Mr. Earl Moore as engine foreman?

A. Yes, sir.

Q. Who was your yardmaster at that time?

A. Mr. Harding.

Q. Did Mr. Harding make any objections about an assistant as engine foreman?

A. Yes, sir, he raised sand when he came around and found fellows he didn't like on the job.

227 Q. Do you know whether he liked Mr. Moore or not?

A. I don't know whether he liked him or not, but that was his general way of doing.

Q. Did he like his work?

A. He didn't like his work.

Q. Did you observe Mr. Moore's work?

A. Not particularly.

Q. Well, you were assistant yardmaster?

A. Yes, sir.

Q. Did his work come under your supervision?

A. Yes, sir.

Q. What kind of switchman would you say he was?

A. He wasn't one of the best. He didn't seem to be.

Q. What was his trouble, if anything?

A. If he would go to do anything it would take him a long time. He was slow.

Q. What other objection was there to him, if any?

A. I didn't see any.

Q. What about his regularity of work?

A. He didn't work very much.

Q. If you have an engine crew which is used to working together and you have a member of that crew that works intermittently,—works today and doesn't work tomorrow, and works day after tomorrow and then doesn't work for three or four days,—does that contribute
228 to the efficiency of that crew?

A. I think it wouldn't.

Q. In what way?

A. Well, you put a new man on each day, he won't know just what he should do.

Q. Did you say it would contribute to the good work or detract from the good work of the crew?

A. It wouldn't be so efficient a crew.

Q. During your time as an employee of the I. C. Railroad Company would you say whether or not you knew the general rule of the I. C. Railroad Company as to what effect it would have on the man's employment if he filed a lawsuit against the Company?

By Mr. Potter:

We object to that.

By the Court:

I will overrule the objection.

Q. Do you know what happened to men that filed lawsuits against the company?

A. They were fired.

Q. How long have you been knowing that was a rule?

A. It has been my impression ever since I have been on the Railroad. I don't know whether it is a rule or not.

229

Cross Examination.

By Mr. Potter:

Q. You say you don't know whether it was a rule or not?

A. I don't know whether it is a rule or not.

Q. That is an impression you got?

A. Yes, sir.

Q. How long were you on the yard under Mr. Harding?

A. I don't know exactly.

Q. Two or three years?

A. About two years.

Q. You were yardmaster up until the time you were injured in 1930, were you not?

A. Not all the time.

Q. But you were at the time of your injury, were you not?

A. Not at the time of my injury.

Q. But prior to your injury for about two years you were yardmaster?

A. Yes, I had been.

Q. You had been day and night yardmaster?

A. Yes, sir.

Q. And during the period when you had been day and night yardmaster was the period during which Earl Moore, the plaintiff in this case, had been working for the I. C.?

A. Well, he worked for me, yes, sir.

Q. Now, did you ever reprimand Mr. Moore for any delinquency in his work?

A. No, I didn't reprimand him.

230 Q. Did you report him for any inefficiency?

A. No, sir.

Q. Isn't it one of the rules that a man must not hurry in that work? That is true, isn't it?

A. I don't know.

Q. Now, as I understand it, the Railroad Company has a seniority roster which includes a great many men on the extra board,—men that do not work reguarly? That is true, isn't it?

A. Not a great many men.

Q. Several men?

A. Yes, sir, some.

Q. As long as there were available competent men on the extra board, do you know of a single time that the I. C. Railroad Company has complained of a man laying off work?

A. Mr. Harding used to complain about it.

Q. What men were they?

A. He is one of them. Johnson is one of them.

Q. You are talking about John Johnson?

A. Yes, sir, he has told me to take him out of service.

Q. As a matter of fact, Johnson ran a restaurant and only returned out there to hold his job on the board?

A. Yes, sir.

Q. That was with the knowledge of the Railroad Company?

A. Yes, sir.

Q. He is still working for the Railroad Company?

A. Yes, sir.

232 J. R. FOREMAN, witness for defendant, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Byrd:

Q. Where do you live?

A. I live in Jackson.

Q. By whom are you employed?

A. I. C. Railroad Company.

Q. How long have you been employed by them?

A. Since January, 1913.

Q. In what capacity?

A. Switchman and yardmaster.

Q. Were you employed during that time in the Jackson, Mississippi, yard?

A. Yes, sir.

Q. Do you know the plaintiff in this case, Earl Moore?

A. Yes, sir.

Q. Were you working for the I. C. when Earl Moore was working for them?

A. Yes, sir.

Q. Did you ever observe Earl Moore's work as switchman?

A. I was yardmaster when he was working there.

Q. Did you have occasion as a yardmaster to observe his work?

A. Yes, sir, he didn't work much of the time. He was off sick a lot.

233 Q. When he reported he was sick, what was the occasion for him making those reports?

A. He would call up and lay off sick.

Q. When he was called for work?

A. He would lay off the call board.

Q. How often would that occur?

A. He was sick quite a bit during the time he was working.

Q. Do you know of your own knowledge that he was sick?

A. That is what he said.

Q. Now, did you ever observe his work as to efficiency of his work?

A. He never did turn out work very good.

Q. Why?

A. He was kind of slow on the job.

Q. During your time as an employee of the I. C. Railroad Company, do you know what the rule of the I. C. has been with reference to men employed by them who filed suit against the Railroad?

A. It is generally understood by me and practically everybody else that it was an automatic discharge if they filed suit.

Q. That had been the rule during the whole time you were employed by them?

A. Yes, sir.

By Mr. Potter:

We object and move the Court to exclude that.

234 By the Court:

I will overrule the objection.

Q. How long had you been yardmaster during the time you were working for I. C.?

A. I was yardmaster from 1918 to 1933.

Q. During that period Mr. Moore was an employee of the I. C. Railroad Company?

A. Not all the time, but part of the time.

Q. And as a switchman he came directly under your supervision?

A. Yes, sir.

Q. Did you ever issue or request your immediate superior to issue any reprimand to Mr. Moore on account of anything he did or failed to do as switchman?

A. I don't remember it.

Q. As I understand it, the I. C. Railroad Company has what the men generally denominate as a service card, do they not?

A. Yes, sir.

Q. They maintain that?

A. The Company does, I think.

Q. And on that service record card there is supposed to be demerits marked whenever any employee of the Railroad Company does not do that which he is supposed to do?

A. They don't get marks for all they are supposed to do that they don't do.

Q. Did you ever request any demerits to be placed against Mr. Moore's record?

235 A. No, sir.

Q. In other words, for trivial matters they were not demerited?

A. No, sir.

Q. If you had ever observed Mr. Moore either in acting or in failing to act while you were his superior, doing anything or failing to do anything that in your opinion would have merited either a reprimand or five or more demerits, you would not have hesitated to give them or to ask your superior to issue the reprimand or the demerits?

A. No, I look over lots of things.

Q. If you had ever seen Mr. Moore doing anything that in your opinion would necessitate placing demerits against his record, it would have been your duty to so notify your superior, wouldn't it?

A. It would have been my duty, but I don't do my duty quite sometimes in that line.

Q. Can you remember anything that Moore ever did that he should have been demerited for and you didn't request demerits to be placed against his record?

A. I don't put demerits against a man if he is slow on the job. I don't give out demerits for that.

Q. Did you ever complain to Mr. Harding or anyone else about Mr. Moore being slow?

A. Mr. Harding complained to me a lot of times about letting him work the engine.

236 Q. Do you know of a single instance when an employee of the Railroad Company was discharged, up until the time Mr. Moore was discharged, because he filed a lawsuit against the Railroad Company?

A. I can't recall any.

Q. Do you know of any person that the Railroad Company has ever complained of for failing to report to work when work was available to him, if there were sufficient capable men on the extra board to take his place?

By Mr. Byrd:

We object.

By the Court:

Objection overruled.

Q. If he notified the call board?

A. If he lays off and notifies the proper one. The call board usually handles that part of it.

237 C. E. MORPHIS, witness for defendant, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Byrd:

Q. Where do you live?

A. Jackson.

Q. What business are you engaged in?

A. Switching for I. C.

Q. How long have you been employed by them?

A. As switchman or altogether?

Q. Altogether.

A. Twenty-three years.

Q. How long as switchman?

A. Fifteen years.

Q. Where were you employed?

A. At the Jackson, Mississippi, Yard.

Q. Were you employed in the Jackson, Mississippi, Yard in 1926?

A. Yes, sir.

Q. Were you employed there when the consolidated roster was published on which the A. & V. Railroad employees were put on the seniority roster of the I. C. Railroad Company?

A. Yes, sir.

Q. Were you a member of the Brotherhood of Railroad Trainmen at that time?

A. Yes, sir.

238 Q. Are you a member of that organization now?

A. Yes, sir.

Q. What position, if any, do you hold with the local organization?

A. Chairman of the local grievance committee.

Q. As chairman of the local grievance committee, what are your duties with reference to the complaints of the men of violation of the contract or other rules governing their work with the Railroad?

A. I handle their claims with the management.

Q. How long have you been chairman of the local grievance committee?

A. Since 1933.

Q. Who was the grievance man prior to that?

A. H. H. Cutler.

Q. At the time this new arrangement was made and the A. & V. switchmen were cut in, did or not that cutting in have any effect on the I. C. employees there in the Jackson Yard?

A. Yes, sir.

Q. Did it have any effect on you?

A. Yes, sir.

Q. Did or not the men continue to work on that roster without objection, so far as you know?

A. Yes, sir.

Q. When was the first time you heard that Mr. Earl Moore was objecting to that cut in?

A. Some four or five years later, and then it
239 was sandhouse talk.

Q. That is something you can't trace to its source?

A. Yes, sir, talked around in the shed and on the corners.

Q. Mr. Moore was doing some of the talking, was he?

A. Yes, sir, I believe so.

Q. Do you know what effect that had upon the rest of the switchmen in the yard,—whether or not it disturbed them or whether or not they were all satisfied?

By Mr. Potter:

We object to that because it is incompetent.

By the Court:

I will overrule the objection.

A. There was quite a bit of objection from both sides.

Q. After the men continued to work under it two or three years, did or not that objection die down?

A. Yes, sir.

Q. When it was again agitated, did it disturb some of the men?

A. I don't recall that it did. There might have been some talk about somebody else having a suit if Mr. Moore won his.

Q. That was generally circulated around the Yard that the outcome of Mr. Moore's suit—

240 By Mr. Potter:

We object to the general rumor.

By the Court:

Objection overruled.

Q. If Mr. Moore won his suit there would be some other suits?

A. Yes, sir.

Q. Do you know the general rule of the I. C. Railroad Company with reference to men who file suit against it while employed by the Company?

A. I understand it that when you file suit against the Company your services are automatically terminated.

Q. When did you find that out?

A. That is some more sandhouse talk.

Q. It was talked generally around the switch shanty?

A. Yes, sir.

Cross Examination.

By Mr. Potter:

Q. You don't recall a single man, up to the time Mr. Moore was discharged, ever having been discharged because he did file a lawsuit?

A. No, sir.

Q. That was just sandhouse talk?

A. Yes, sir.

241 Q. That is true?

A. Yes, sir.

Q. You never received that information from any official source?

A. No, sir.

Q. You never saw it in the printed rule?

A. No, sir.

Q. Now, were you the local chairman in 1926 when this consolidated roster was promulgated?

A. No, sir.

242 T. S. JACKSON, witness for defendant, recalled for further cross examination, testified as follows:

Cross Examination.

By Mr. Potter:

Q. As general chairman of the grievance committee of the I. C. Railroad Company of the Brotherhood of Railroad Trainmen, you would not have taken up the grievance of a switchman seeking to establish his right to work in the Jackson Yard over a member of the Brotherhood of Railroad Trainmen by reason of any rights he claimed under the Switchmen's Union of North America contract?

A. I think I would have considered it the duty of the Switchmen's Union to take that up.

243 L. E. HOWARD, witness for defendant, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Byrd:

Q. Where do you live?

A. Hobart, Indiana.

Q. With headquarters in Chicago?

A. Yes, sir.

Q. Are you employed by the Illinois Central Railroad Company?

A. Yes, sir.

Q. How long have you been employed by them?

A. A little over 41 years.

Q. In what department of the Railroad are you now employed?

A. Superintendent of wages and working conditions.

Q. As such superintendent, what are your duties?

A. Well, up until about a year ago I attended all hearings, meetings and conferences in connection with wage matters and grievances, with the possible exception of five, since 1914.

Q. Did that have to do with the establishment of seniority rosters?

A. It would, yes, sir.

Q. It would have to do with the wages and working conditions of switchmen and trainmen?

A. It would.

Q. And the construction of their contract?

244 A. It would.

Q. And the enforcement of their contract?

A. It would.

Q. Are you familiar with the transaction at Jackson, Mississippi, in 1926 when the consolidated roster was published there for the I. C. Yard?

A. I remember it, yes, sir, but I was not at the conference.

Q. As I understand it, that conference took place at Jackson?

A. Yes, sir.

Q. But you were informed of it?

A. Yes, sir.

Q. I will ask you whether at that time you had any connection with the General Manager's office?

A. I reported to the General Manager.

Q. Were you familiar with the arrangements and conferences the General Manager had with the various Union labor organizations regarding complaints about the contract?

A. Yes, sir.

Q. Do you remember in 1927 any conference or complaint or anything having been presented to the General Manager of the Railroad, or to you as Director of wages and personnel, by any officer of the Switchmen's Union of North America pertaining to the consolidated roster of Jackson, Mississippi?

A. I think if my memory serves me correctly on June 8, 1928, President Canon of the Citizens' Union wrote Mr. Patterson asking for a conference. He didn't think
 245 the list had been drawn up correctly. Mr. Patterson replied to him on June 12 and said to him that we were in conference with two other organizations and as soon as he had the opportunity he would get hold of him and have a conference with him. Mr. Canon left town and that is the last we heard of it.

Q. Is the I. C., or was the I. C., so far as you know, a party to the complaint filed by the Switchmen's Union of North America against the I. C. before the National Railroad Board in regard to this matter?

A. That is something I never heard of.

Q. Is it a part of your duty to know whether such things are filed?

A. It would certainly come to my desk.

Q. Did it ever come to your desk?

A. Not to my knowledge.

Q. You are familiar with the proceedings that took place in the other lawsuits that Mr. Moore filed against the Illinois Central?

A. Yes, sir.

Q. You were a witness in this other lawsuit?

A. I was not put on the stand.

Q. You were here to testify?

A. Yes, sir.

Q. Do you know how many witnesses the Illinois Central had at that trial?

A. With the officers and me and the employees,
 246 I would say somewhere in the neighborhood of thirty.

Q. Now, do you know or can you give us an estimate of what the cost of defending that lawsuit was to the Illinois Central?

By Mr. Potter:

We object because that is immaterial.

By the Court:

I will overrule the objection.

A. Well, it would be in the neighborhood, I would say, of \$2,000.00, pro rating the time that we lost from our work and other duties.

Q. Did that include any of the expense of attending the trial?

A. It included some expense away from home that we had to be reimbursed for.

Q. How long did you say you have been working for the Illinois Central?

A. Forty-one years.

Q. Do you know the general rule of the Illinois Central Railroad Company with respect to employees who file suit against the Company?

By Mr. Potter:

We object.

By the Court:

Objection overruled.

247

A. Yes, sir, I do.

Q. What is that rule?

A. It has been a rule that when an employee files suit against the Railroad he automatically severs himself from service.

Q. Do you know of any occasion when any employee of the Railroad Company has been discharged for filing suit against the Company?

A. Yes, sir, I had the opportunity and cause to check on some fourteen months ago, and as near as I could find there were 27 such cases in the I. C. System.

Q. Any of them switchmen?

A. Yes, sir, a number of them were switchmen.

Q. Any of them brakemen?

A. Plenty of them.

Cross Examination.

By Mr. Potter:

Q. What has been the form through which the management has informed the men of such a policy?

A. Well, not being out in the division and being with the men, I couldn't answer that question.

Q. Do you know a single printed rule to that effect?

A. There is none.

Q. There is none?

A. Not that I know of.

Q. What did you say your position was?

A. Supervisor of Wages.

248 Q. And also matters of grievance?

A. That is right.

Q. As such it would have come to your attention?

A. No, that would be strictly an operating matter.

Q. You are generally familiar with the operation of the Railroad in regard to those matters?

A. I am somewhat familiar with the operation.

Q. You don't know of any printed rules?

A. I said none that I know of.

Q. Don't you know there are none?

A. I wouldn't say there is and I wouldn't say there isn't. I never saw one.

By Mr. Byrd:

Defendant rests.

249 E. A. FLEMING, witness for plaintiff, introduced in rebuttal, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Potter:

Q. By whom are you now employed?

A. Illinois Central.

Q. How long have you been working for them?

A. Since 1902.

Q. In what capacity?

A. Switchman and engine foreman.

Q. Do you know the plaintiff in this case, Earl Moore?

A. Yes, sir.

Q. From 1926 to 1933 he was employed also by the Illinois Central?

A. I suppose so. He was in their employ, but I don't know how long.

Q. Did you have occasion to work with Mr. Moore and around Mr. Moore during the period when he was switchman for the Illinois Central?

A. Yes, sir.

Q. Did you observe his work?

A. Yes, sir.

Q. Tell the Court if you ever observed Mr. Moore acting in any capacity other than as an efficient Switchman?

A. I don't remember that I have.

Q. As I understand it, the Illinois Central
250 maintains an extra board?

A. Yes, sir.

Q. Were there or not sufficient capable men on the extra board and if a man is supposed to work and notifies the call board that he is going to lay off, have you ever heard of any complaint of such action on the part of the Illinois Central?

A. I don't know that I have.

Cross Examination.

By Mr. Byrd:

Q. How many times did you ever see Mr. Moore perform his work?

A. I couldn't say.

Q. You don't know?

A. No, sir.

251 JOHN MASTERS, witness for plaintiff, called in rebuttal, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Potter:

Q. You are a resident citizen of Jackson?

A. Yes, sir.

Q. And are now employed by the Illinois Central Railroad Company?

A. Yes, sir.

Q. How long have you been working for the Railroad?

A. Thirty-eight or thirty-nine years.

Q. Do you know the plaintiff in this case, Earl Moore?

A. Yes, sir.

Q. Did you know him at the time when he was working as a switchman for A. & V.?

A. Yes, sir.

Q. Did you know him at the time he was working as switchman for the Illinois Central Railroad?

A. Yes, sir.

Q. During the time he was working as switchman for the I. C. Railroad Company did you have occasion to come in contact with him from time to time during that entire period and observe his work as a switchman?

A. Yes, sir.

252 Q. Please tell the Court whether or not on any occasion you ever saw Mr. Moore act other than as an efficient switchman?

A. No, sir.

Q. The Railroad Company maintains an extra board, does it not?

A. Yes, sir.

Q. That is men who do not work regularly?

A. Yes, sir.

Q. Those are the younger men in point of service?

A. Yes, sir.

Q. Assuming that a senior man has work available for him, but does not desire to work, and he notifies the call board to that effect and there are competent men on the extra board available to work, under such circumstances have you ever heard of the Railroad Company making any complaint when a man lays off?

A. No, sir.

Q. You know, do you not, that the Railroad has what they call a service card or efficiency record card?

A. I don't know. I have never seen such a card. They have efficiency records.

Q. Do you know that any action that any employee takes that merits discipline is noted on such a card?

A. They write a letter notifying him.

By Mr. Byrd:

No questions.

253 J. A. VARNADO, witness for plaintiff, called in rebuttal, after having been duly sworn, testified as follows:

Direct Examination.

By Mr. Potter:

Q. You are a resident of Jackson and an employee of the Illinois Central Railroad Company, are you not?

A. Yes, sir.

Q. How long have you lived in Jackson?

A. Practically all my life.

Q. How long have you been working for the Illinois Central?

A. Since March, 1913.

Q. What positions with the Railroad Company have you held?

A. Well, as clerk and switchman and yardmaster.

Q. And as switchman, having been both helper and engine foreman, have you not?

A. Yes, sir.

Q. During what period of time were you yardmaster?

A. September, 1925, to November, 1927.

Q. Mr. Moore was working for the I. C. Railroad Company during a portion of that time, was he not?

A. Yes, sir.

Q. In the capacity as switchman?

A. Yes, sir.

Q. You were one of his immediate superiors, were you not?

A. I don't know. I didn't call myself much of a boss out there.

254 Q. As a matter of fact, when you were yardmaster you were over Mr. Moore?

A. Yes, sir, in the performance of his duty he was supposed to take instructions from me.

Q. During the time that you were yardmaster did you have any occasion to reprimand or issue any demerits and make any complaint about Mr. Moore's work?

A. I had no occasion to make any complaint about his work and I wouldn't have been authorized to make any demerits. That is with the trainmaster.

Q. If he had failed to perform his duty it would have been your duty to report him to the Superintendent?

A. Yes, sir.

Q. And you would have done your duty?

A. Yes, sir.

Q. After you ceased being yardmaster then you were engine foreman?

A. Yes, sir.

Q. As engine foreman and while Mr. Moore was working for the Railroad Company, did you observe his work?

A. Well, no, I didn't have occasion to observe his work that I recall because most of the time I worked practically all the time at night and he worked practically all the time in the daytime.

Q. At the time of the consolidation of this roster in 1926 how many engines was the I. C. operating
255 in the North Yard?

A. I am not exactly positive about that, but when we took over the G. & S. I. we had 14 engines and I think we were working about 12 or 13 when we took over the A. & V.

Q. You are familiar with the fact, are you not, that the Railroad Company has what you may call a service record card and which they denominate as an efficiency record?

A. Yes, sir.

Q. Please state whether or not it is a fact that any action of a switchman that merits discipline is noted on that card?

A. Well, in cases that are considered serious enough by the officer in charge,—I might say the general yardmaster or trainmaster,—an investigation is held and if it is decided that the man merits discipline, that is noted on the service record.

Q. Do you know of any incident when a switchman to whom work was available who desired to lay off work and not work on that day or for several days and who notified the call board of such fact, and when there were competent men on the extra board available for service, has the Railroad Company to your knowledge ever complained of such action on the part of the man?

A. The only time that they complained was when men were short and if a man don't want to work then, you have to take some action, if he continues to dodge his duty to the Railroad. If there are plenty of men, he is permitted to lay off.

256 Q. From the time that Mr. Moore severed his relation with the Company there were plenty of extra men on the board?

A. I can't say. At times there were and at times there weren't during the time I was working out there.

Q. Did you ever run out?

A. At times we ran out.

Cross Examination.

By Mr. Byrd:

Q. This demerit proposition that he is talking about, it is a fact that a man cannot have a demerit placed on his record until charges are filed against him and he is given an opportunity to be heard and they hold an investigation?

A. That is right.

Q. You did not work with Mr. Moore?

A. To the best of my knowledge Mr. Moore and I have never worked on the same crew.

Q. When you were working as yardmaster how many engine crews did you have under you?

A. It varied according to the shipping. Sometimes it would be three and sometimes six or eight.

Q. They were scattered all over the yard?

A. Yes, sir.

Q. It wasn't possible for you to have your eye on them all the time?

A. No, sir.

257 Q. Do you know what Mr. Moore's ability as a switchman was?

A. I never heard any complaints against him and I never noticed him do anything that was out of line or wrong.

Q. You didn't have occasion to watch him do anything?

A. No, sir, most of the time I didn't. Mr. Moore was in the A. & V. employ and when he was on the shift I worked, then he worked in the A. & V. yard.

258 A. E. McGHEE, witness for plaintiff, recalled in rebuttal, testified as follows:

Direct Examination.

By Mr. Potter:

Q. At the time of the consolidation of this roster into the roster of November, 1926, and for one year prior thereto, how many engines were working regularly during the time that the Alabama & Vicksburg Railway Company operated it and during the time it was operated by the I. C. Railroad Company?

A. I don't get the question.

Q. For a year prior to the consolidation of the roster, how many engines were working in the West Yard out there at the time the I. C. was operating it or at the time the A. & V. was operating it?

A. Prior to the consolidation the A. & V. had three 7-day jobs and one 6-day job.

Q. Working every day?

A. Yes, sir.

Q. For a year prior to the roster?

A. Yes, sir.

259

Cross Examination.

By Mr. Byrd:

Q. You mean prior to the roster or prior to the consolidation?

A. Prior to the consolidation.

Q. After the consolidation what was the ratio?

A. Anywhere from one to three working there all the time.

Q. What was the number of engines working in the I. C. Yard?

A. All worked from the same place.

Q. How many engines worked in all in the Jackson Yards, including the A. & V.?

A. Fifteen to seventeen engines.

By Mr. Potter:
Plaintiff rests.

260 By Mr. Byrd:

I would like to renew our motion for a directed verdict and entry of judgment for the defendant.

By Mr. Potter:
At this time the plaintiff also moves for judgment.

By the Court:
I will reserve ruling on both of these motions.

262 Filed February 21, 1939.

February 20, 1939.

Honorable Chalmers Potter,
Attorney at Law,
Jackson, Mississippi.
Messrs. May & Byrd,
Attorneys at Law,
Jackson, Mississippi.

Re: Earl Moore
vs.
Illinois Central Railroad Co.

8086.

Gentlemen:

I have reached the conclusion that the plaintiff is entitled to a judgment, as I think the decision in the case of Moore v. Illinois Central, 176 S. 593 and G. & S. I. v.

McLaughan, have established the right of the plaintiff to recover and the facts as shown by the record did not justify the company in breaching its contract. The validity of the contract was upheld by the Supreme Court of Mississippi and, of course, under the Erie Railway Company case, that decision is binding upon the Court.

I think the real reason of the Company in discharging Moore was because he filed the suit for the purpose of establishing his standing on the priority list, and I believe the better reasoned cases hold that the filing of a lawsuit in good faith is not sufficient cause to breach a contract. Of course, it would be a sufficient reason not to employ a man or not to renew a contract when there was an option to renew, since in that instance the Company would have a right to employ or not, but after a valid contract is once entered into, then I think the greater weight of authorities is to the effect that
 263 the filing of a lawsuit in good faith is no excuse for breaching a contract.

In the present case I think the plaintiff was acting in good faith in an effort to determine just where he stood. He consulted reputable counsel who advised the suit. Therefore, I think that the case of Odeneal v. Henry, 70 Miss. 172, and the others cited by defendant are not applicable. It is true that that an employer has the right to make reasonable rules and regulations and if the reasonable rules and regulations are violated, then the right to discharge arises, as was held in Corley case, 107 Miss. 67. The conduct was sufficient to justify the discharge, but in the present case there was a situation existing confronting the employees that meant much more to them than the ordinary situation, and really meant much to the defendant railway company to determine just in what order of priority its employees stood. This was more or less in the nature of a declaratory judgment, so it cannot be said that the plaintiff was acting in bad faith.

It is true that the plaintiff laid off work a considerable amount of time, but he was not discharged for this. I think it is apparent that the real reason for his discharge was because he filed the suit. There was no published rule of the company, and it is doubtful from the evidence if the plaintiff knew that the company had such a rule, but even if there had been a published rule, it would have been necessary for it to be reasonable. I am of the opinion that an arbitrary rule that any man who files a suit would be discharged would be in violation of the terms of the written contract. Of course, the parties could enter into a contract to that effect, but such is not the contract in the present case.

264. I think the rule of damages is that the plaintiff is entitled to recover all damages that he suffered as a proximate result of the breach of the contract—not up to the time of the filing of the declaration, but for all damages that accrued to him as the proximate result of the breach, less any amount that he may have earned for himself. I do not uphold the contention, however, that the number of days worked by Cutler is the criterion by which to measure the number of days that plaintiff would have worked. I think the only reasonable rule in determining this fact is to take the average of the number of days that the plaintiff himself worked over a long period of time. Taking this as the criterion, in 1926 he worked $\frac{1}{20}$ of the time that he could have worked; in 1927 he worked $\frac{1}{2}$ of the time; in 1928 he worked $\frac{2}{5}$ of the time; in 1929 he worked $\frac{2}{3}$ of the time; in 1930 he worked $\frac{3}{5}$ of the time; and in 1931 he worked about $\frac{1}{5}$ of the time. By taking the average from these deductions it will be shown that he worked approximately $\frac{1}{2}$ of the time that he could have worked. If we take the total number of days in the year that he could have worked, to-wit, 336 days, and divide that by one-half the time, which I find from the evidence he would have worked, we reach the conclusion that he would have worked 168

days in the year. If his average earnings were placed at \$6.64 per day, he would have earned the sum of \$1,115.50 per year. From February, 1933, to November, 1936, would be three and three-fourths years and the total amount that he would have earned during that time is \$4,183.20 and a judgment may be entered for the plaintiff in this amount.

265 I decline to allow interest for the reason that the amount of damages was unliquidated and I do not think that interest is properly allowable upon unliquidated damages. The record shows that he was employed in November, 1936, at a salary of \$105.00 per month, which, of course, is more than he would have earned had he continued in the employment of the Railroad Company.

You gentlemen may prepare a judgment for this amount and also you may submit to me proposed findings of fact and conclusions of law along the lines outlined in this letter. I would be glad if you would submit the proposed findings of fact, but if you prefer that I made this up, I shall be glad to do so, but you can judge from the foregoing substantially what my findings of fact are.

I am filing a copy of this letter with the Clerk of the Court so that it may be considered as the opinion of the Court.

With very kindest regards, I am,

Sincerely yours,

SIDNEY C. MIZE,
District Judge.

266

ORDER.

Filed March 9, 1939.

C. O. B. 1. p. 277.

(Title Omitted.)

This cause having come on at a former day of this term of the Court to be heard before the Court without a jury, and the Court, having heard all of the evidence and considered the same, is of the opinion that the plaintiff is entitled to a judgment in the sum of \$4,183.20:

It is therefore

Ordered by the Court that the plaintiff, Earl Moore, do have of and from the defendant, Illinois Central Railroad Company, the sum of Four Thousand One Hundred Eighty-three and 20/100 (\$4,183.20) Dollars, and interest at the rate of 6% from this date until paid, together with all costs herein accrued, for all of which execution may issue.

Ordered, this the 7th day of March, 1939.

S. C. MIZE,

United States District Judge.

267 FINDINGS OF FACT AND CONCLUSIONS OF
LAW.

(Attached to Order Filed March 9, 1939.)

(Title Omitted.)

Finding of Fact.

1. The Court finds as a fact that the plaintiff was a member of the Brotherhood of Railroad Trainmen and the defendant entered into a contract with same, which provided the rules, rates of pay, etc., for trainmen employed by it; that the plaintiff had been employed by the defendant as trainman since June 2, 1926, and that on November 13, 1926, the defendant published a seniority roster for the trainmen, and under the provisions of this contract trainmen were given work according to their seniority.

2. The Court finds that this contract provided that no employee should be discharged without just cause;

3. That on or about February 15, 1933, the plaintiff was discharged without just cause;

4. That the defendant discharged plaintiff because plaintiff had filed suit against it on October 15, 1932, in the Circuit Court of Hinds County in which the plaintiff alleged that he had been given a lower place on the seniority roster than he was entitled to receive;

268 5. That this first suit against the defendant was filed in good faith to establish the seniority position of the plaintiff and upon the advice of his attorney, and that this filing of the suit was not sufficient and just cause to discharge him;

6. That the plaintiff was ready, willing and able at all times to carry out his part of the contract;

7. That the defendant Railroad Company had a rule which provided that any employee suing the Railroad Company would be discharged, but that this rule was not published and was not generally known among its employees;

8. That the plaintiff in this cause did not know of any such rule;

9. That the contract entered into between the Brotherhood and the Railroad Company was a valid contract;

10. That the plaintiff laid off from work a considerable amount of time, but that someone else took his place during this period; that he was not discharged for this, but that his laying off from work was waived by the defendant Railroad Company;

11. That by a breach of the contract the plaintiff has suffered damages, but that he has not shown by the evidence that he would have worked every day and is not entitled to establish his damages by the number of days that were worked by Cutler;

12. The Court finds as a fact that in determining the number of days he was damaged, the fair inference from the evidence is to take the average of the number of days that the plaintiff himself worked over a long period of time. Taking this as a criterion, in 1926 he worked $\frac{1}{20}$ of the time that he could have worked; in 1927 he worked $\frac{1}{2}$ of the time; in 1928 he worked $\frac{2}{5}$ of the time; in 1929 he worked $\frac{2}{3}$ of the time; in 1930 he worked $\frac{3}{5}$ of the time; and in 1931 he worked $\frac{1}{5}$ of the time. By taking the average from these deduc-

tions it will be shown that he worked approximately 1/2 of the time that he could have worked. If we take the total number of days in the year that he could have worked, to-wit, 336 days, and divide that by one-half of the time, which I find from the evidence he would have worked, we reach the conclusion that he would have worked 168 days in the year; that he would have earned on an average of \$6.64 per day; that from February, 1933, to November, 1936, he would have worked three and three-fourths years;

13. That based upon his average earnings he would have earned \$1,115.50 per year;

14. That for the three and three-fourths years he would have earned \$4,183.20 if the defendant company had carried out its contract;

15. That in November, 1936, plaintiff was employed by the government at a salary of \$105.00 per month and has not suffered any damages by reason of the breach of the contract since that time;

16. That the plaintiff is not entitled to recover interest as the amount of damages was unliquidated and not definitely determined until the date of this judgment.

Conclusions of Law.

My conclusions of law are that:

1. The filing of a lawsuit by a party in good faith and upon the advice of counsel is not sufficient justification for the breach of the contract when the contract does not specifically provide that if a lawsuit should be filed against the company it would be ground for dismissal.

270 2. The company has a right to make reasonable rules and regulations with reference to filing lawsuits against it by its employees, but a rule or regulation which provides that the filing of a lawsuit against the employer would be ground for breach of contract when the employee in good faith, notwithstanding, believes that he has a right to sue for the purpose of establishing his rights, would be an unreasonable rule.

3. The contract in the present case was a valid contract and the plaintiff was entitled to sue for a breach thereof, as was held in the case of *Moore v. I. C. R. R. Co.*, 176 So. 193; *McGlohn v. G. & S. I. R. R. Co.*, 174 So. 250.

4. The rule of damages is that the plaintiff is entitled to recover all damages that he suffers as a proximate result of the breach of the contract, less any amount that he may have earned for himself.

5. The plaintiff is not entitled under the law of Mississippi to collect interest upon the amount of the damages so suffered for the reason that they were unliquidated and until the time that they were made certain by a judgment, interest is not allowable.

This the 7th day of March, 1939.

S. C. MIZE,

United States District Judge.

271 MOTION TO SET ASIDE JUDGMENT AS TO
 DAMAGES AND RENDER.

Filed March 14, 1939.

(Title Omitted.)

And now comes Earl Moore and moves the Court to set aside the judgment heretofore rendered in his favor for \$4,183.20 and to re-assess his damages, and for cause thereof shows unto the Court as follows:

First: That the undisputed testimony showed that prior to Moore's discharge Moore worked whenever work was available, except when he was ill.

Second: That the undisputed evidence shows that since the discharge Moore has been in good health at all times and at all times ready, able and willing to work.

Third: No future damage was awarded.

Fourth: No interest was allowed.

And for other causes to be assigned.

CHALMERS POTTER.

I, Chalmers Potter, attorney for plaintiff, hereby certify that I have this day handed to Messrs. May & Byrd, attorneys for defendant, a true copy of the foregoing Motion.

This the 14th day of March, 1939.

CHALMERS POTTER.

272

ORDER OVERRULING MOTION.

Filed March 14, 1939.

(Title Omitted.)

Came on this day this cause to be heard upon the motion of the plaintiff to set aside the judgment heretofore rendered in his favor in so far as the damages are concerned and to re-assess his damages, and came the parties, and the Court having heard and considered said motion and argument of counsel thereon and being of the opinion that said motion should be overruled, therefore, be it and it is hereby ordered and adjudged that the motion of the plaintiff be and the same is hereby overruled, to which action of the Court the plaintiff excepted.

Ordered and Adjudged this the 13th day of March, 1939.

S. C. MIZE,

U. S. District Judge.

C. O. B. 1, p. 281.

273 NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS.

In the District Court of the United States for the Jackson Division of the Southern District of Mississippi.

Filed March 14, 1939.

Earl Moore, Plaintiff,

vs.

No. 8086.

Illinois Central Railroad Company, Defendant.

Notice is hereby given that the Illinois Central Railroad Company, defendant above named, hereby appeals to the

Circuit Court of Appeals for the Fifth Circuit from the final judgment entered in this cause on the 7th day of March, 1939.

J. L. BYRD,

Attorney for Illinois Central
Railroad Company.

Jackson, Miss.

274 State of Mississippi,
County of Hinds.

Know All Men by These Presents, That we, Illinois Central Railroad Company, a corporation, as principal, and American Surety Company of New York, a corporation, as surety, are held and firmly bound unto Earl Moore in the penal sum of Five Thousand Dollars (\$5,000.00), for the payment of which well and truly to be made we bind ourselves, our successors and assigns.

Yet, upon these conditions, that whereas on the 7th day of March, 1939, a judgment was entered in the District Court of the United States for the Jackson Division of the Southern District of Mississippi in the cause therein pending, styled No. 8086, Earl Moore, Plaintiff, vs. Illinois Central Railroad Company, in favor of the said Earl Moore and against the said Illinois Central Railroad Company in the sum of \$4183.20, with interest at 6% per annum from said date, and all costs, and whereas the said Illinois Central Railroad Company feels aggrieved at said judgment and has prayed an appeal therefrom to the Circuit Court of Appeals for the Fifth Circuit.

Now if the said above bound principal, Illinois Central Railroad Company, shall prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, then this obligation shall be void, otherwise to remain in full force and effect.

Witness our signatures, this the 16th day of March, 1939.

ILLINOIS CENTRAL RAIL-
ROAD COMPANY,

Principal,

By J. L. BYRD, Attorney.

AMERICAN SURETY COM-
PANY OF NEW YORK,

Surety,

(Seal)

By W. B. GRAVES,

Attorney in Fact.

The foregoing bond and the sureties thereon approved by me, this the 16th day of March, 1939.

S. C. MIZE,

United States District Judge.

275 NOTICE OF APPEAL TO THE CIRCUIT COURT
OF APPEALS.

Filed March 17, 1939.

In the District Court of the United States for the Jackson
Division of the Southern District of Mississippi.

Earl Moore, Plaintiff,

vs.

At Law No. 8086.

Illinois Central Railroad Company, Defendant.

Notice is hereby given that Earl Moore, above named, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit from that portion of the final judgment entered in this action on March 14, 1939, assessing damages

against the Illinois Central Railroad Company, contending said damages were insufficient.

CHALMERS POTTER,
Attorney for Earl Moore.

401 Deposit Guaranty Bank Building,
Jackson, Mississippi.

276

COST BOND.

Filed March 17, 1939.

(Title Omitted.)

Know All Men By These Presents, that we, Earl Moore, principal, and James Burns and D. L. Lacey, sureties, are held and firmly bound unto the Illinois Central Railroad Company in the sum of \$250.00 for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors and administrators forever.

The condition of the foregoing obligation is such that there has been lately rendered in this cause a judgment in favor of the said Moore and against the Illinois Central Railroad Company. The said Moore, feeling aggrieved at said judgment, has given notice of his appeal to the Circuit Court of Appeals for the Fifth Circuit;

Now therefore, if the said Moore shall well and truly prosecute his said appeal to the Circuit Court of Appeals for the Fifth Circuit with effect, or pay all costs that might there be rendered against him, this obligation to be void; otherwise to remain in full force and effect.

Witness our Signatures this the 17th day of March,
1939.

EARL MOORE, Principal.
JAMES BURNS,
D. L. LACEY,
Sureties.

277

Filed April 6, 1939.

C. O. B. 1, p. 297.

(Title Omitted.)

It appearing to the Court that Honorable Chalmers Potter, counsel of record for Earl Moore, the plaintiff in this cause, died on Saturday, April 1, 1939, and that the contents of the record in this cause had not been agreed upon, and that it would be to the best interests of all concerned that the time for filing the record on appeal and docketing the action should be extended,

It is therefore, ordered that the time for filing and docketing the appeal in this cause and the time for filing the record on appeal and docketing the action be and it is hereby extended for forty days from this date, which time is not more than ninety days from the date of the first notice of appeal in this case.

Ordered this the 4th day of April, 1939.

S. C. MIZE,
District Judge.

DESIGNATION OF CONTENTS OF RECORD ON
APPEAL AND CROSS APPEAL BY COUNSEL FOR
BOTH PARTIES.

278

Filed May 13, 1939.

(Title Omitted.)

The appellant and appellee hereby designate the contents of the record on appeal and cross appeal of this cause to the United States Circuit Court of Appeals as follows, to-wit:

1. Transcript of record from State Court.
2. Motion to withdraw pleadings.
3. Order entered June 3, 1938, permitting withdrawal of pleas theretofore filed.
4. Plea in abatement, filed April 30, 1938.
5. Plaintiff's demurrer to defendant's plea in abatement, filed June 3, 1938.
6. Order sustaining demurrer to plea in abatement.
7. General issue plea and special pleas Nos. 1, 2, 3, 4, 5, 6 and 7, and the demurrers of the plaintiff to special pleas 1, 2, 3, 4, 6 and 7, and replication to defendant's fifth special plea.
8. Order sustaining the plaintiff's demurrers to the defendant's first, second, third, fourth, sixth and seventh special pleas and order overruling the demurrer of the

279 defendant to plaintiff's replication to the defendant's fifth special plea, and order overruling plaintiff's motion for judgment and providing that the defendant answer under the new rule of procedure and providing that the defendant be not required to raise the same points heretofore raised. Said order being dated October 8, 1938, and filed October 11, 1938. Opinion of Court dated August 16, 1938. Opinion of Court dated October 3, 1938.

9. Amendment to paragraph 6 of the declaration filed October 20, 1938.

10. Amendment to declaration and order thereon filed October 24, 1938.

11. Answer of the defendant filed October 20, 1938.

12. The testimony and exhibits in question and answer form, except such exhibits as are eliminated by agreement, herewith filed. There is herewith filed the original and one copy of the transcript of the testimony taken upon the trial of the cause.

13. Opinion of Court dated February 20, 1939.

14. Findings of fact and conclusions of law and judgment dated March 7, 1939, filed March 9, 1939.

15. Motion of the plaintiff to set aside judgment as to damages and to render, filed March 14, 1939.

16. Order overruling motion to set aside the judgment, filed March 14, 1939. Order dated March 13, 1939.

17. Notice of appeal to Circuit Court of Appeals, filed by the defendant March 14, 1939.

280 18. Appeal bond in the penalty of \$5,000, filed by the defendant and approved by the United States District Judge on March 16, 1939.

19. Notice of appeal to the Circuit Court of Appeals by the plaintiff, filed March 17, 1939.

20. Cost bond in the penalty of \$250.00, filed by the plaintiff on March 13, 1939.

21. Order entered April 4, 1939, extending time for filing and docketing appeal in this cause.

Respectfully submitted,

J. L. BYRD,

Counsel for Defendant and
Appellant, Illinois Central
Railroad Company.

Jackson, Miss.

C. B. SNOW,

Counsel for Plaintiff and
Appellee, Earl Moore.

Jackson, Miss.

281

Filed May 13, 1939.

(Title Omitted.)

It is hereby agreed by and between J. L. Byrd, counsel for Illinois Central Railroad Company, defendant in the above styled cause, and C. B. Snow, attorney for Earl Moore, plaintiff in the foregoing styled cause, that in order to shorten the record on appeal to eliminate unnecessary costs as follows, to-wit:

1. There is referred to in the testimony of the plaintiff, Earl Moore, the Supreme Court record, which is a record

of the Supreme Court of the State of Mississippi and a permanent record in the case of Earl Moore vs. Yazoo and Mississippi Valley Railroad Company and Illinois Central Railroad Company, reported in 166 So., page 395, 176 Miss., page 65, and it is agreed that the said transcript of the Supreme Court record show that Earl Moore, the plaintiff in this cause, filed a suit in the Circuit Court of the First District of Hinds County, Mississippi, and that the declaration appears in this record; that the defendant Yazoo and Mississippi Valley Railroad Company and Illinois Central Railroad Company filed several special pleas to said declaration and issue was joined on several of said pleas and the case was heard in so far as plaintiff's testimony was concerned, whereupon a motion for a peremptory instruction was made by the defendant and the motion was sustained and judgment was entered against the plaintiff Earl Moore, all of which appears in the removal record. That said case was appealed to the Supreme Court of Mississippi and there affirmed, and is reported as aforesaid.

2. That Exhibit B to testimony of Earl Moore need not be copied at all, it being agreed that said Exhibit B is Exhibit A to the declaration, and it is further agreed that in copying Exhibit A to the declaration only pages 32 to 41, inclusive, and pages 58 to 59, inclusive, of said exhibit shall be copied in full. It being agreed that said 12 pages contain the contract sued on in this cause and the remaining part of said Exhibit A has no bearing on and does not pertain to the instant case.

3. It is agreed that there need not be copied in the record the transportation rules of the Illinois Central System, Exhibit H to the testimony of plaintiff Moore, but it is agreed that said rules do not provide that the filing of the lawsuit against the railroad company will be sufficient grounds for discharge.

Witness our signatures, this the 13 day of May, 1939.

J. L. BYRD,
Attorney for Appellant.

Jackson, Miss.

C. B. SNOW,
Attorney for Appellee.

Jackson, Miss:

283

(Title Omitted.)

It is hereby ordered that the Clerk of this Court be and he is hereby granted thirty (30) days additional time from this date, within which to complete the appeal record in this cause, and to file same in the Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana.

This the 13th day of May, 1939.

S. C. MIZE,
District Judge.

C. O. B. 1, p. 393.

Filed May 13, 1939.

284.

CLERK'S CERTIFICATE.

United States of America,
Southern District of Mississippi.

I, B. L. TODD, JR., Clerk of the District Court of the United States for the Southern District of Mississippi, do hereby certify that the foregoing pages contain a true and correct transcript of the record in the case of Earl Moore, Plaintiff, v. Illinois Central Railroad Company, Defendant, No. 8086 at Law as the same now remains of record in my office at Jackson, Mississippi.

Witness my hand and seal this June 2nd, 1939.

B. L. TODD, JR.,

(Seal)

Clerk, United States District
Court, Southern Dist. of Mis-
sissippi,

By E. M. WELLS,
Deputy Clerk.

[fol. 217] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of April 16th, 1940

No. 9168

ILLINOIS CENTRAL RAILROAD COMPANY

versus

EARL MOORE

(And Reverse Title)

On this day this cause was called, and, after argument by James L. Byrd, Esq., for appellant and cross-appellee, and C. B. Snow, Esq., for appellee and cross-appellant, was submitted to the Court.

[fol. 218] OPINION OF THE COURT AND DISSENTING OPINION
OF HOLMES, CIRCUIT JUDGE—Filed June 20, 1940

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 9168

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant and Cross-
Appellee,

versus

EARL MOORE, Appellee and Cross-Appellant

(And Reverse Title)

Appeal and Cross-Appeal from the District Court of the
United States for the Southern District of Mississippi

(June 20, 1940)

Before Sibley, Holmes, and McCord, Circuit Judges

SIBLEY, Circuit Judge:

Prior to June, 1926, the appellee Earl Moore was working as a switchman for the Alabama & Vicksburg Railway Company at its yards in Jackson, Miss. He was a member of the Switchmen's Union of North America which had an

agreement with that railway company as to rates of pay, hours of service and working conditions. In June, 1926, [fol. 219] the appellant, Illinois Central Railroad Company, through the Yazoo & Mississippi Valley R. R. Co., took over the operation of the Alabama & Vicksburg Railway Company, expressly assuming performance of said union contract. A consolidation of switching yards at Jackson led in November, 1926, to the making of a new seniority roster of switchmen in the consolidated yards. Moore's number was moved from 37 to 52. He worked in the yard under this number for some time, being in consequence sometimes idle, and then brought a suit in October, 1932, for damages because of the partial unemployment, asserting that his employment was with reference to his old Switchmen's Union contract. He lost his case in the Supreme Court of Mississippi on March 16, 1936, that court saying: "The effect of the promulgation of this November, 1926, seniority roster was to offer the appellant and the other switchmen affected a new contract in so far as their relative seniority was concerned; and where the breach of a contract is followed by the offer of another as a substitute therefor, the acceptance thereof waives the breach of the former. By accepting work under the new roster without protest the Illinois Central was justified in believing that the appellant would claim only thereunder and that it could safely deal with its other switchmen on that assumption and accord to them their rights thereunder." *Moore vs. Yazoo & Miss. Valley R. R. Co.*, 176 Miss. 65, 166 So. 395.

Meanwhile, on Feb. 15, 1933, Moore, having been absent from work for a year on sick leave, reported for work and was discharged as "an unsatisfactory employee." On his request he was given a hearing before the Superintendent, in which his slowness and irregularity of working, and his having sued the Company were brought up. The latter was found in the trial of this case to have been the real cause of [fol. 220] the discharge. Moore appealed to the General Manager, but did not attend at the time and place set for hearing.

On Sept. 25, 1936, Moore sued the Illinois Central Railroad Company in a court of Mississippi for damages for his discharge, alleging that at the time of his discharge he was a member of the Brotherhood of Railroad Trainmen, which since 1924 had an agreement in force with that Company touching rates of pay and other things, including

seniority, material portions of which were exhibited, along with the seniority roster of November, 1926, above mentioned, on which he was number 52. He alleged that he "was entitled to work under said contract of employment whenever work was available for 52 men in the Jackson yards and said contract provides, among other things, that no person should be fired or discharged without just cause"; and that he was discharged arbitrarily and without just cause. Six special pleas were filed and held good on demurrer, but on appeal to the Supreme Court of Mississippi the judgment was reversed and the cause remanded for further proceedings. *Moore vs. Illinois Cent. R. R. Co.*, 180 Miss. 276, 176 So. 593. Moore then amended to claim damages in excess of \$3,000, and the cause was removed to the district court of the United States. By that court's permission the six pleas were withdrawn and a so-called plea in abatement filed. It set up that the Illinois Central Railroad Company is a common carrier in interstate commerce whose railroad extends from Chicago in Illinois to New Orleans in Louisiana, passing through Mississippi and other States; and that it and Moore as its switchman were subject to the Acts of Congress, especially that of May 20, 1926, amended June 21, 1934, 45 U. S. C. A. § 151 and ff; that the Union contract relied on exists under said laws, and said contract and laws require adjustment of disputes thereunder by the Company's higher officers, and then by the Ad-[fol. 221] justment Board, which remedies have not been pursued, because of which the suit should be abated. This plea was stricken on demurrer. Six pleas substantially like those withdrawn were then filed, and a seventh setting up that the Union contract was by its terms terminable on thirty days' notice in writing and that Moore's written notice of discharge was in any view effective after thirty days. These pleas and an answer were disposed of adversely by demurrer, or by trial before the court without a jury, and judgment was entered for \$4,183.20. This appeal results, with a cross-appeal which claims larger damages.

The district judge in all his important rulings of law considered himself bound by the decisions of the Supreme Court of Mississippi in this and other cases, under the authority of *Erie vs. Tompkins*, 304 U. S. 64.

We are impressed with the seriousness of the question as to what law determines the validity and meaning of railroad

union contracts, and the remedies applicable to them; and of the practical consequences of the holding that for so long a period as six years a discharged employee may sit quiet without the pursuit of the special remedies in the contract or under the Acts of Congress, and then by suit recover back pay for that time, when perhaps proof may have become difficult touching the merits of his discharge.

We are of opinion that the doctrine of *Erie vs. Tompkins* applies only to local matters governed wholly by State law. A railroad union contract applying over a railroad system which operates in many States is not such. Its meaning and effect ought to be the same in each State. The present contract was signed by a representative of the Union residing in Chicago and by the General Manager of the railroad whose headquarters are in Chicago. Nothing appears to localize it in Mississippi. Its subject matter, the relationship of an interstate railroad with its employees, is well [fol. 222] within the commerce power of Congress and has for fifty years been a subject of federal legislation.*

The very matter of collective agreements was taken over and extensively regulated and remedies for disputes provided by the Railroad Labor Act of 1926, amended in 1934. Section 2 of the Act, 45 U. S. C. A. 151-a, names as one of its purposes: "(5) To provide for the *prompt* and orderly settlement of *all disputes* growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." In stating the duties of carriers and employees, 45 U. S. C. A. §152(1), it requires them to exert effort "to make and maintain such agreements", and that "all disputes between a carrier and its or their employees shall be considered, and

* Contracts of railroad employment were regulated by the Act of June 1, 1898, 30 Stat. 424, but the Act was held unconstitutional, *Adair vs. U. S.*, 208 U. S. 161. It was repealed and substituted by the Act of July 15, 1913, 45 U. S. C. A. §§ 101-125. "Controversies concerning wages, hours of labor or conditions of employment" were dealt with; and agreements were to be sought by mediation and arbitration. Hearing by representatives of employees was provided in federal receiverships, Sect. 9. Hours of labor were regulated in 1907. 45 U. S. C. A. § 62. The Act of Feb. 28, 1920, 45 U. S. C. A. §§ 131-146, again dealt with such controversies and encouraged the making of agreements thereabout.

if possible decided, with all expedition, in conferences between representatives designated and authorized so to confer * * *." Three lengthy paragraphs relating to the choice of representatives, the making of collective bargains, the deduction of union dues, and to agreements not to join a union, are expressly written into every contract of employment. 45 U. S. C. A. §152(3) (4) (5) (8). Subparagraph (7) prohibits changes in the rates of pay, rules or working conditions of employees as a class, as embodied in the agreement, except as provided by the agreement or the statute. Section 3, 45 U. S. C. A. §153, provides jurisdiction in the Railroad Adjustment Board for all manner of disputes, the First Division being expressly given jurisdiction over those involving yard-service employees. Sub-[fol. 223] section (i) makes it plain that not only disputes raised by the Union but also those of a single employee are included, saying: "The disputes between *an employee* or group of employees and a carrier growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted June 21, 1934, shall be handled in the usual manner up to and including the *chief operating officer* of the carrier", and then may be referred to the Adjustment Board. Awards are final except as to a money award; Subsection (m) (o). Awards, including money awards, are enforceable in the district court: Subsection (p). This legislation was explained and vindicated as respects the forming of collective agreements in Texas and New Orleans R. R. Co. vs. Brotherhood, 281 U. S. 548, and Virginia Railway Co. vs. System Federation No. 40, 300 U. S. 515.

A collective agreement between the employees of an interstate carrier by rail and their employer is therefore not a local matter as to whose nature and application the decisions of a State Supreme Court are binding on the federal courts. On the contrary, because of the subject matter, and of the federal legislation touching it, a federal court is bound to exercise an independent judgment, and the Supreme Court of the United States has final authority. The decisions of the Supreme Court of Mississippi are entitled to the same respectful consideration as are those of the courts of other States, but no more.

The decision of the Mississippi court in this very controversy is not conclusive of it. As in the case of Wichita

Royalty Co. vs. City National Bank, 306 U. S. 103, the decision was one of reversal, and not a final adjudication; and the Mississippi court does not regard itself as bound upon a second appeal, if satisfied it decided the law wrongly on the first. *Brewer vs. Browning*, 115 Miss. 358, 76 So. 267. [fol. 224] Since the removal of the case to the federal court this court stands in the place of the Supreme Court of Mississippi and with the same power of reconsideration. If the matter were only one of Mississippi law we might well abide that court's latest expression, but because it involves the interpretation and application of a collective contract of railroad employees we should re-examine the law.

We are unable to agree that a single employee suing on his contract of employment to enforce his individual right to recover pay or for damages for discharge sues directly upon the collective agreement as a complete contract made for his benefit. See *Yazoo & Miss. Valley Ry. Co. vs. Sideboard*, 161 Miss. 4, 133 So. 669. The federal statutes above referred to speak of the collective agreement as an "agreement concerning rates of pay, rules, and working conditions", (45 U. S. C. A. §152(1) (6), and often), but the individual's contract is referred to as "the contract of employment between the carrier and each employee." (45 U. S. C. A. § 152(8)). The collective agreement may contain a contract between the union and the carrier, as for an open or closed shop, collection of union dues,* and the like, but it is not itself a contract of employment. It binds no one to serve the carrier and binds the carrier to hire no particular person. It is only a basis agreed upon as mutually satisfactory for making contracts of employment. The contracts of employment arise when individual men present themselves, are examined touching their knowledge of the railroad rules and other things, and stand the required physical examinations, and are severally accepted as employees. Or they arise tacitly when old employees, after the publication of the collective agreement, continue to work. In the absence [fol. 225] of any special agreement otherwise, every employment may be presumed to be on the basis of the collective agreement and to adopt its terms. But ordinarily

*At present the federal law prohibits such a contract in railroad collective agreements.

there is nothing to prevent a special agreement if an employee desires it. The collective agreement before us concludes: "Nothing in these rules shall be construed to abrogate any local rights the men may now have", showing that its application might vary. When the collective agreement, tacitly or expressly, is taken as supplying any or all of the terms of the service of a particular employee, it still is not the contract, but only a standard to which the parties have referred in making their parol contract. Such is the view deliberately adopted by this court in a case where a single employee was asserting a right to the pay fixed in the collective agreement, where we held the employee, though not a member of the Union which made the agreement, was employed under its terms. *Yazoo & Miss. Val. Ry. Co. vs. Webb*, 64 Fed. (2) 902. A similar view is maintained both in Kentucky and in Tennessee, where the contract before us also operates. *Hudson vs. Cin. Ry. Co.*, 152 Ky. 711, 154 S. W. 47; *Cross Mountain Coal Co. vs. Ault*, — Tenn. —; 9 S. W. (2) 692. A recent well considered case in which all the authorities are reviewed is *Rentschler vs. Missouri Pac. R. R. Co.*, 126 Neb. 493, 95 A. L. R. 1. In it the *Webb* case was cited with approval and its holdings adopted. See also *Gary vs. Central of Ga. Ry.*, 37 Ga. App. 744, 44 Ga. App. 120, 123. The collective agreement as such is made, defended and changed by the union, but the rights of each employee employed under it are his own, and he may waive or assert them himself as he sees fit. *Piercy vs. L. & N. R. R. Co.*, 198 Ky. 477, 248 S. W. 1042.*

[fol. 226] It follows clearly that when an individual employee sues for damages for a breach of his contract of employment because of a discharge contrary to the collective agreement as *Moore* does; or because he was not paid the

* On an appeal from Canada the English Privy Council held the collective agreement to be no contract between the individual and his employer, and to be enforceable only by the union and by means of a strike, the individual having no right of action on it. *Young vs. Canadian Northern Ry.*, 38 Manitoba L. R. 485, 567. — A. C. —. This decision was followed in *Kessel vs. Great Northern Ry. Co.*, 51 Fed. (2) 304. See also *Bancroft vs. Canadian Pac. R. R. Co.*, 30 Manitoba L. R. 401.

wages fixed in the collective agreement, as Webb did, (*Yazoo & Miss. Valley R. R. Co. vs. Webb*, supra), he is not suing on the written collective agreement, but upon his parol contract of hiring, which adopted those terms of the collective agreement which are applicable to him. Moore's contract of employment in 1933 would not be established by merely proving this written collective agreement made in 1924 by a union to which he did not belong and with a railroad for which he did not work. He was then working for another railroad, which had another collective agreement under which he continued to claim rights until the adverse decision in March, 1936. To establish the contract of employment which he now claims, Moore must show that he became an employee of the Illinois Central Railroad Company under circumstances which made the terms of the Brotherhood's collective agreement applicable to him. Perhaps he would have to show his acceptance of the Brotherhood's seniority roster of November, 1926, since it was that act which ended his employment with reference to the contract between the Switchmen's Union and the Alabama & Vicksburg Ry. Co., as held by the Supreme Court of Mississippi. *Moore vs. Yazoo & Miss. Valley Ry. Co.*, 176 Miss. 65, 166 So. 395.

His contract of employment standing thus, and no federal statute providing any limitation, we think the pleaded State statute of three years may apply: "Actions on an open account, or stated account, not acknowledged in writing and signed by the debtor, and on any *unwritten contract, express or implied*, shall be commenced within three years next after the cause of such action accrued and not after." Mississippi Code, Sect. 2299. It is well settled that a contract is unwritten if the contract itself cannot be proven wholly by writings. 37 C. J., Limitations, § 86. "If there is any break in the chain of writings and such break has to be supplied by parol testimony, then the three years' statute applies and not the six years' * * * Any break in the writing or writings which is material and provable by parol brings the three years' statute into operation." *City of Hattiesburg vs. Cobb Bros.*, — Miss. —, 163 So. 676. It is not apparent from the petition that Moore's contract of employment is wholly provable in writing, and the plea of the three year statute should not have been stricken on demurrer.

In the event writings do exist which bring the case within the six year statute of limitation, the other defenses will

become material. We consider them briefly. The plea that suit may not be filed without recourse to the Adjustment Board is without merit. The Adjustment Board may settle the disputes of the individual employee as well as those of the group, 45 U. S. C. A. § 153 (i); as may the Mediation Board, 45 U. S. C. A. § 155 (1). The first cited section says that a dispute "shall be handled in the usual manner up to and including the chief operating officer of the carrier," and then it "may be referred" to the Adjustment Board. The permission to go to the Adjustment Board does not exclude direct recourse to the courts.

The provision in the collective agreement for a hearing before the carrier's officers, with appeal to the highest, is in line with the requirements of the statute, but neither it nor the statute intends to make the employer's adverse decision binding on the employee. The requirement that relief be sought up through the highest operating officer seems to be a prerequisite to an appeal to the Adjustment Board, but not to a suit in court.

[fol. 228] The conductors' collective agreement in *McGlohn vs. Gulf & S. I. R. Co.*, 179 Miss. 396, 174 So. 250, expressly specified that conductors would "not be demerited, disciplined, or discharged without just cause", and provided for notice and trial before discharge. The agreement before us provides only that yardmen taken out of service for cause shall be notified of the reason and given a hearing within five days if demanded, with right of appeal. "In case the suspension or dismissal or censure is found to be unjust, yardmen or switchtenders shall be reinstated and paid for all time lost." It is argued with force that since the employment is for no definite time, and the employee may quit at any time, the employer may discharge him at any time; and that to cut off the right to discharge at will a clear stipulation is required, like that in the *McGlohn* case. The contract before us contains only a stipulation that the cause of discharge shall be stated and a hearing given on demand, and if "found to be unjust, yardmen and switchtenders shall be reinstated and paid for all time lost." We find in these provisions a clear implication that discharge is not to be at the employer's will, but only for a just cause, and it would be unreasonable, without express provision to that effect, to hold that the railroad officers are the sole or the final judges of the justice of the cause. Nor is appeal to the highest operating officer for reinstatement made a pre-

requisite to an appeal to the court for damages. Surely a court, enlightened by witnesses, may judge of the justice of a cause of discharge. In case of an arbitrary discharge the union might take the matter to the management, the Adjustment Board, or even to the test of a strike. The individual also on his individual contract of employment may seek reinstatement with pay through the railroad's officers, or through the Adjustment Board; or he may, before or after [fol. 229] pursuing those remedies, acquiesce in the discharge and ask damages for a breach of contract in a court of law.

The filing by an employee, on advice of counsel, of a suit to establish his seniority status is not by itself a just cause to discharge him. The seniority provision of a collective agreement is an important and valuable part of the individual contracts of employment made thereunder. It has been held the union cannot waive or destroy it. *Piercy vs. L. & N. R. R. Co.*, 198 Ky. 477, 248 S. W. 1042. If the employee's seniority is not satisfactorily settled otherwise, we see no reason why an appeal to a court to establish his right, if decently conducted, should forfeit his employment. If the railroad wishes to retain no one who sues it, a stipulation to that effect ought to be added to the provisions about unjust discharge. The rule about discharging those who sue claimed to exist on the Illinois Central is shown to be only a policy, and not known to Moore. It does not warrant a court in saying that Moore's seniority suit was a just cause for discharge. Whether it was the true cause, or whether another sufficient cause was acted on, we leave open for retrial.

The provision of the collective agreement that "These rules and rates shall remain in effect until Dec. 31, 1925, and thereafter until revised or abrogated, of which intention thirty days written notice shall be given", refers to the collective agreement as a whole, and the notice contemplated is one between the railroad and the union. It does not mean that by a written notice to an employee his contract can be ended without just cause after thirty days. We so held in *Yazoo & Miss. Valley R. R. Co. vs. Webb*, 64 Fed. (2) 902. The plea that the discharge thus became operative after thirty days was properly stricken.

The judgment against Moore in his seniority suit is not *res judicata* in this suit. The effect of a State court's judgment [fol. 230] as *res judicata* has always been held a ques-

tion of State law; and the holding of the Supreme Court of Mississippi in this case, 180 Miss. 276, 176 So. 593, is on that point conclusive. This suit is upon a contract of employment with the Illinois Central Railroad Company, which embraces terms of the Brotherhood's agreement. That suit was upon a contract of employment with the Alabama & Vicksburg Ry. Co., which embraced terms of the Switchmen's Union agreement, and which was assumed by the Yazoo & Miss. Valley R. R. Co. Moore lost his former suit solely because it was held his old employment had been superseded by that on which he now sues. The causes of action are not the same.

On the cross-appeal, we do not think that the earnings of the man next below Moore on the seniority roster measure Moore's damages. Moore was not a regular worker before his discharge, and it was proper to consider this in estimating his losses due to discharge.

The judgment is reversed because of error in striking the plea of three years' limitation, and the cause is remanded for further proceedings not inconsistent with this opinion.

HOLMES, Circuit Judge, dissenting:

This is a suit for damages for breach of a contract made for the benefit of a specific class of persons which included the plaintiff. The contract of employment between the plaintiff and the railroad company was made in Mississippi, was to be performed in Mississippi, and was therein actually performed until the date of his alleged wrongful discharge in the same state.

There is no federal question in this case, except as to matters of defense. Our jurisdiction rests solely upon diversity of citizenship. This action was originally instituted in a state court of Mississippi for damages in the sum of \$3,000. It went to the Supreme Court of that state, which, reversing the trial court, held that the six-year statute of limitations applied and that the action was not barred. *Moore v. Illinois Central R. Co.*, 180 Miss. 276, 176 So. 593. After it was remanded for retrial, and after the plaintiff had amended so as to claim more than \$3,000, the case was removed to a federal court on the ground of diversity of citizenship. There is no federal statute of limitations involved here; only state statutes.

I cannot reconcile with *Erie Railroad v. Tompkins*, 304 U. S. 64, the majority opinion wherein it urges uniformity of construction of a contract, operating in many states, as a basis of federal courts exercising an independent judgment. This argument, in one aspect, seems to be in accord with the view of the Supreme Court of Mississippi to the effect that this suit is upon a written contract. Later, however, the opinion holds that the written contract was merely adopted by the employee, either orally or impliedly when he went to work, and, therefore, that the three-year statute applies.

Upon the facts before us, the federal court is not authorized to exercise an independent judgment, either as to the construction of the contract sued on or as to the applicable statute of limitations. Both are questions of state law, and we should follow the state court. The highest court of Mississippi has held that the action is not barred, and I think we are bound by its decision, since it does not appear that the state court has altered its opinion. *Wichita Co. [fol. 232] v. State Bank*, 306 U. S. 103, 107.

For the reasons indicated, I dissent from the judgment of reversal.

[fol. 233] Extract from the Minutes of June 20th, 1940

No. 9168

ILLINOIS CENTRAL RAILROAD COMPANY

versus

EARL MOORE

(and reverse title)

JUDGMENT

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed because of error in striking the plea of three years'

limitation; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee and cross-appellant, Earl Moore, and the sureties on the cross-appeal bond herein, James Burns and D. L. Lacey, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

“Holmes, Circuit Judge, dissents.”

BLANK PAGE

[fols. 234-239] PETITION FOR REHEARING—Filed July 11,
1940.

IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS
FIFTH CIRCUIT.

No. 9168.

ILLINOIS CENTRAL RAILROAD COMPANY,
APPELLANT AND CROSS-APPELLEE,

VS.

EARL MOORE, APPELLEE AND CROSS-
APPELLANT.

PETITION FOR A REHEARING.

The opinion of this Court was rendered on June 20, 1940, reversing judgment of the District Court of the United States for the Jackson Division of the Southern District of Mississippi in favor of Appellee and against Appellant. Appellee respectfully petitions a rehearing and in support thereof assigns as follows:

1. The Rules of this Court, in specifying what each brief shall contain, provide, Rule 24, Section 2, sub-section (b):

"A specification of the errors relied upon, which shall set out separately and particularly each error asserted and intended to be urged. Errors not speci-

fied according to this rule will be disregarded, but the Court, at its option, may notice a plain error not specified."

The Court in its opinion in this case affirmed the District Court on every ruling assigned as error and on every point presented, but "The judgment is reversed because of error in striking the plea of three years limitation."

The plea of limitation is Appellant's Special Plea No. 6 (Tr. pg. 75-76). Appellee demurred to this special plea, and the demurrer was sustained.

Appellant's Specification of Errors relied on is found in its original brief, at page 9 thereof. The action of the District Court in sustaining the demurrer to said Special Plea No. 6, the plea of three years limitation, is not assigned as error.

Said Special Plea No. 6 is not mentioned in Appellant's brief, except that at page 38 of the original brief Appellant concedes that the demurrer to said Special Plea No. 6, along with demurrers to other pleas, was properly sustained.

Naturally, since the action of the District Court in striking this plea was not specified as error by the Appellant, and since the propriety of so doing was specifically conceded by Appellant, the question was in no manner presented by Appellee. On this question Appellee has not had his day in court.

We do not conceive that this question, going to the very heart of this lawsuit, can be termed "a plain error" such as the Rule of the Court referred to excepts from the rule itself that errors not specified will be disregarded.

We most respectfully submit that this cause should not have been reversed on a ruling not assigned as error

by Appellant; not urged by Appellant, but on the other hand the correctness of the ruling of the "lower court confessed and conceded by Appellant.

The plea in question is a plea of a statute of limitations. Appellant's actions in regard to the ruling of the District Court in sustaining the demurrer thereto constitutes in effect a waiver of said plea.

2. THE SIX YEAR STATUTE OF LIMITATIONS AND NOT THE THREE YEARS STATUTE APPLIES.

It is the Mississippi Statute of Limitations which is involved in this lawsuit. It is the Mississippi Statute of Limitations invoked in Appellant's Special Plea No. 6—Section 2299, Code of Mississippi of 1930. This section of the Mississippi law fixes the period of limitations on actions on unwritten contracts at three years. Section 2292 of this same Code fixes the period of limitations in other actions, including actions on written contracts, at six years. Without these Mississippi statutes there would be no period of limitation on this action. There is no period of limitation fixed thereon by the Federal Law.

We submit that if a statute of limitation of a state is invoked, the same is invoked as construed by the decisions of the highest court of such state.

"State statutes of limitation, as construed by the state courts, should be applied in actions at law in a Federal Court where they are applicable * * *"
25 C. J. 849 and authorities cited.

And again:

"Where a state statute of limitations has been

construed by the highest court of the state as not applying to existing causes of action, the same construction of the same statute will be adopted by Federal Courts, if not in conflict with the paramount authority of the Constitution or laws of the United States or with the fundamental principles of justice and common right,"

37 C. J. 697.

The case of *Murray v. Gibson*, 15 How. (U.S.) 421, 14 L.Ed. 755, cited as authority for this text, is a case involving a Mississippi Statute of Limitations, and we submit is in point here.

The Supreme Court of the State of Mississippi, in two fully considered opinions, has held that a suit of the character involved here is a suit on a written contract; a suit for damages for breach of a contract made for the benefit of a class of persons.

Gulf & Ship Island R. R. v. McGlohn, 183 Miss. 465, 184 Sou. 71; same case 179 Miss. 396, 174 Sou. 250; and *Y. & M. V. R. R. v. Sideboard*, 161 Miss. 4, 133 Sou. 669.

In this identical case, *Moore v. Ill. Cent. R. R.*, 180 Miss. 276, 176 Sou. 595, the Mississippi Court held that, of the two Mississippi Statutes of Limitation, this was an action in which the Mississippi three year statute was *not* applicable but the Mississippi six year statute was applicable.

This Court in its opinion concedes that the effect of a state court's judgment as *res judicata* "has always been held a question of state law; and the holding of the Supreme Court of Mississippi in this case, 180 Miss. 276, 176 Sou. 593, is on that point conclusive."

We submit that a stronger rule applies where there is involved a state court's holding on its own statute of limitations which has been invoked.

This is not a matter governed by the Federal Constitution or by acts of Congress. The Supreme Courts in *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, has said that except in matters so governed the Federal Court sitting in a state should follow the law of such state whether so declared by its Legislature or its highest court.

It has always been the law that a Federal Court in applying the statute law of a state should apply the same as construed by such state.

Here the Mississippi Court has spoken definitely in this case with reference to the application of its own statutes. It followed two of its own previous decisions. It has not modified, altered, or amended its opinion. It has held its six year statute is applicable and its three year statute is not applicable. We submit, under the *Erie R. R.* case and *Wichita Royalty Co. v. Bank*, 306 U.S. 103, 83 L.Ed. 515, the Mississippi Court ought to be followed.

Here we have a situation typical of the kind the Supreme Court was endeavoring to prevent in the *Erie Railroad Company* case. If the *Illinois Central Railroad Company* was a Mississippi corporation, it could not have removed this cause to the Federal Court, and the Mississippi Court has already said Moore's suit is not barred by the Mississippi three year statute and he could maintain his action, but when he gets over in the Federal Court that Court holds that the Mississippi Court is wrong in the application of its own statute and that the suit is barred thereby and cannot be maintained.

The Yazoo & Mississippi Valley Railroad Company is a railroad company in the State of Mississippi doing an interstate business. It so happens that it is incorporated under the laws of the State of Mississippi. If a suit where the identical question is involved is filed against the Yazoo & Mississippi Valley Railroad Company the same could, of course, not be removed to the Federal Court. In such a suit the three year statute of limitations would not apply, while in this case, if the present judgment stands, Moore's suit is barred by the three year statute, a statute of the State of Mississippi, which in the identical case before the Supreme Court of this state is not barred.

This kind of a situation just isn't right.

WHEREFORE, Appellant prays that a rehearing be granted and that the judgment of the District Court be affirmed.

GEO. BUTLER,

C. B. SNOW,

Attorneys for Appellee.

I, C. B. SNOW, of Counsel for Appellee, do hereby certify that this petition for rehearing is not filed for delay, but in my opinion the same is well taken and should be granted, and the opinion of the District Court should be affirmed.

I further certify that I have this day handed to Hon. J. L. Byrd, Attorney of record for Appellant, a true copy of this petition for rehearing.

This the _____ day of July, 1940.

Of Counsel for Appellee.

Extract from the Minutes of August 8, 1940

No. 9168

ILLINOIS CENTRAL RAILROAD COMPANY

VERSUS

EARL MOORE

(And Reverse Title)

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 241]

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 217 to 240 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 9168, wherein Illinois Central Railroad Company is appellant and cross-appellee, and Earl Moore is appellee and cross-appellant, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 216 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 21st day of December, A. D. 1940.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit, by E. V. Vendling, Deputy Clerk. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

BLANK PAGE

[fol. 242] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 16, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2878)

BLANK PAGE

FILE COPY

Office - Supreme Court U. S.

FILLED

NOV 4 1940

SHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

NO. 550

EARL MOORE, PETITIONER,

VS.

ILLINOIS CENTRAL RAILROAD COMPANY,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FIFTH CIRCUIT AND BRIEF IN SUPPORT
THEREOF.

GEO. BUTLER,
Jackson, Mississippi,
GARNER W. GREEN,
Jackson, Mississippi,
Counsel for Petitioner.

ANK PAGE

INDEX

Petition for Writ of Certiorari—

Preliminary	1
Summary and short statement of the matters involved	2
Reasons relied on for the allowance of the writ	4

Petitioner's Brief in Support of Petition for Writ of Certiorari—

Opinions delivered in the courts below	7
Statement as to the jurisdiction of the Supreme Court of the United States	8
Statement of the case	9
Specification of error urged	12
Argument	13

TABLE OF CASES

Andrews vs. Bacon, 38 Fed. 777 (1st Cir.)	5, 15
Arkansas Fuel Oil Co. vs. City of Blackwell, 87 F. 2d 50 (10th Cir.)	6, 16
Balkan vs. Woodstock Iron Company, 154 U. S. 177, 38 L. Ed. 953	5, 15
Bauserman vs. Blunt, 147 U. S. 647, 37 L. Ed. 316	5, 15
Brunswick Terminal Co. vs. Natl. Bk., 99 Fed. 635 (4th Cir.)	5, 15
Bullion & Exchange Bank vs. Hegler, 93 Fed. 890 (9th Cir.)	5, 16
Erie Railroad Company vs. Tompkins, 304 U. S. 64, 82 L. Ed. 1188	4, 15, 17, 18, 19
Farley vs. Carey Show Print Co., 249 Fed. 476 (2nd Cir.)	5, 15
First Natl. Bk. vs. Anglo, etc., Bank, 37 F. 2d 564 (3rd Cir.)	5, 15
Futrell vs. Branson, 104 F. 2d 409 (8th Cir.)	5, 16

Great Western Telephone Co. vs. Purdy, 162 U. S. 329, 40 L. Ed. 986	5, 15
Gulf & Ship Island Railroad Company vs. McGlohn, 183 Miss. 465, 184 So. 71; Same Case, 179 Miss. 396, 174 So. 250	4, 17
Illinois Central Railroad Company vs. Moore, 112 F. 2d 959	7, 12
Moore vs. Illinois Central Railroad Company, 24 Fed. Supp. 731	7
Moore vs. Illinois Central Railroad Company, 180 Miss. 276, 176 So. 595	4, 10, 11, 12, 13, 16, 18
Ruhlin vs. New York Life Insurance Company, 304 U. S. 202, 82 L. Ed. 1290	4, 15
Salyer vs. Consolidation Coal Co., 246 Fed. 794 (6th Cir.)	5, 16
Security Trust Co. vs. Black River Bank, 187 U. S. 111, 47 L. Ed. 147	5, 15
Taylor vs. Union Pac. R. R. Co., 123 Fed. 155 (8th Cir.)	5, 16
Van Dyke vs. Parker, 83 F. 2d 35 (9th Cir.)	6, 16
Weems vs. Carter, 30 F. 2d 202 (4th Cir.)	5, 16
Wheeling Bridge Co. vs. Reymann Brewing Co., 90 Fed. 189 (4th Cir.)	5, 15
Wichita Royalty Company vs. Bank, 306 U. S. 103, 83 L. Ed. 515	5, 17, 18, 19
Wilson vs. Smith, 117 Fed. 707 (3rd Cir.)	5, 15
Y. & M. V. R. R. Co. vs. Sideboard, 161 Miss. 4, 133 So. 669	4, 17
Young vs. Alexander, 29 F. 2d 555 (8th Cir.)	5, 16

STATUTES

Code of Mississippi, 1930, Sec. 2292	13, 14, 17
Code of Mississippi, 1930, Sec. 2299	13, 14, 17

TREATISES

25 C. J. 849	14-15
37 C. J. 697	15

Supreme Court of the United States

OCTOBER TERM, 1940.

No. _____

EARL MOORE, PETITIONER,

VS.

ILLINOIS CENTRAL RAILROAD COMPANY,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:

PRELIMINARY.

Your petitioner, Earl Moore, a citizen of the United States residing in Hinds County, in the State of Mississippi, respectfully prays that writ of certiorari issue to review the judgment of the United States Circuit Court

of Appeals for the Fifth Circuit entered June 20, 1940, petition for rehearing denied August 8, 1940, by which said judgment said Court of Appeals reversed judgment theretofore rendered in the District Court of the United States for the Jackson Division of the Southern District of Mississippi, in favor of petitioner, plaintiff there, against respondent, Illinois Central Railroad Company, defendant in said District Court.

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED.

Petitioner filed his suit here involved against the respondent railroad company for a lump sum as damages for the breach of a contract of employment. Petitioner was a railroad switchman and the contract involved is the contract between the railroad and the labor union of which petitioner was a member. The contract was made an exhibit to the declaration or complaint.

The suit was first filed in the Mississippi State Court for an amount less than the jurisdiction of the National Court. In the Mississippi State Court, amongst other defenses not here involved, respondent railroad company invoked and plead the Mississippi Three Year Statute of Limitations, the same being the statute applicable to suits on open accounts and unwritten contracts.

The cause came on for hearing, and said state trial court sustained petitioner's demurrer to respondent's said plea of the Mississippi Three Year Statute of Limitations and thereby held that said three year statute was not applicable, but rendered judgment against petitioner on other pleas not here involved.

Petitioner appealed from said judgment to the Supreme Court of the State of Mississippi, the court of last resort of said state, and on said appeal the Mississippi Supreme Court, in this same case, held that the Mississippi Three Year Statute of Limitations did not apply,

but that the suit, being a suit on a written contract and not on an unwritten contract, was governed by the Mississippi Six Year Statute of Limitations, and accordingly was not barred. The judgment of the lower court was reversed and the cause remanded for further proceedings.

When the cause was returned to the lower court in accordance with the decision of the Supreme Court of the State of Mississippi, the declaration or complaint was amended and damages were demanded in an amount within the jurisdiction of the National Court.

Thereupon, petitioner, plaintiff there, being a resident of the State of Mississippi, and respondent railroad company being a non-resident of the State of Mississippi, a diversity of citizenship existed and upon petition of respondent railroad company, the cause was removed to the United States District Court for the Jackson Division of the Southern District of Mississippi.

In the District Court respondent railroad company again invoked and plead the Mississippi Three Year Statute of Limitations.

When the cause came on for hearing in the District Court on said plea invoking the Mississippi Three Year Statute of Limitations, the District Court held in accordance with the decision of the Mississippi Supreme Court in this same case, that the Mississippi Three Year Statute of Limitations did not apply, but that the suit was governed by the Mississippi Six Year Statute of Limitations and was not barred, and in a trial on the merits of the case, judgment was rendered in favor of petitioner and against respondent railroad company.

From said judgment respondent railroad company appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which court reversed the District Court and has held contrary to the Mississippi Supreme Court in this same case that the Mississippi Three Year Statute, and not the Mississippi Six Year Statute of Limitations, is the applicable statute.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

It is respectfully submitted that the opinion of the Circuit Court of Appeals for the Fifth Circuit in this cause holding that the Mississippi Three Year Statute of Limitations invoked by respondent, and not the Mississippi Six Year Statute of Limitations, is applicable, is in direct conflict with the decision of the Supreme Court of the State of Mississippi in this same cause construing and applying its own Statute of Limitations, which statute was invoked by respondent, which said decision of the Supreme Court of the State of Mississippi has not been reversed or in any manner modified and is not in conflict with any prior or subsequent decision of said court, but is in accord with prior decisions thereof. *Moore v. Illinois Central Railroad Company*, 180 Miss. 276, 176 So. 595.

Said opinion of the Court of Appeals for the Fifth Circuit is likewise in conflict with prior decisions of the Supreme Court of the State of Mississippi wherein it is held that such suits are suits on written contracts to which the Mississippi Six Year Statute of Limitations is applicable and not the Mississippi Three Year Statute of Limitations. *Gulf & Ship Island Railroad Company v. McGlohn*, 183 Miss. 465, 184 So. 71; Same Case, 179 Miss. 396, 174 So. 250; and *Y. & M. V. R. R. Co. v. Sideboard*, 161 Miss. 4, 133 So. 669.

Said opinion of the Court of Appeals in declining to follow the decision of the Supreme Court of the State of Mississippi in this same case, as heretofore set forth, and the law of this state as announced in the decisions hereinabove referred to, is in conflict with the decisions of the Supreme Court of the United States in *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188; *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202, 82 L.

Ed. 1290; and *Wichita Royalty Company v. Bank*, 306 U. S. 103, 83 L. Ed. 515.

The decision of the Court of Appeals in failing to follow the construction and application of the Mississippi Statute of Limitations placed thereon by the Mississippi Supreme Court is in direct conflict with the decisions of the Supreme Court of the United States in the following cases:

Bauserman v. Blunt, 147 U. S. 647, 37 L. Ed. 316;

Balkan v. Woodstock Iron Company, 154 U. S. 177, 38 L. Ed. 953;

Great Western Telephone Co. v. Purdy, 162 U. S. 329, 40 L. Ed. 986; and

Security Trust Co. v. Black River Bank, 187 U. S. 111, 47 L. Ed. 147.

And is in direct conflict with the various courts of appeal as follows:

First Circuit, *Andrews v. Bacon*, 38 Fed. 777.
Second Circuit, *Farley v. Carey Show Print Co.*, 249 Fed. 476.

Third Circuit, *Wilson v. Smith*, 117 Fed. 707; and
First Natl. Bk. v. Anglo, etc., Bank, 37 F. 2d 564.

Fourth Circuit, *Wheeling Bridge Co. v. Reymann Brewing Co.*, 90 Fed. 189;

Brunswick Terminal Co. v. Natl. Bk., 99 Fed. 635; and

Weems v. Carter, 30 F. 2d 202.

Sixth Circuit, *Salyer v. Consolidation Coal Co.*, 246 Fed. 794.

Eighth Circuit, *Taylor v. Union Pac. R. R. Co.*, 123 Fed. 155;

Young v. Alexander, 29 F. 2d 555; and

Futrell v. Branson, 104 F. 2d 409.

Ninth Circuit, *Bullion & Exchange Bank v. Hegler*, 93 Fed. 890; and

Van Dyke v. Parker, 83 F. 2d 35.

Tenth Circuit, Arkansas Fuel Oil Co. v. City of Blackwell, 87 F. 2d 50.

Wherefore, a writ of certiorari is respectfully asked.

GEO. BUTLER,

Jackson, Mississippi,

GARNER W. GREEN,

Jackson, Mississippi,

Counsel for Petitioner.

Service of petition for certiorari, brief in support thereof and a copy of printed record is hereby acknowledged, this the _____ day of October, 1940.

Counsel for Respondent.

Supreme Court of the United States

OCTOBER TERM, 1940.

No. _____

EARL MOORE, PETITIONER,

VS.

ILLINOIS CENTRAL RAILROAD COMPANY.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:

OPINIONS DELIVERED IN THE COURTS BELOW.

The opinion of the District Court of the United States for the Jackson Division of the Southern District of Mississippi is in the record, pages 196-199, inclusive. This opinion is reported, *Moore v. Illinois Central Railroad Company*, 24 Fed. Supp. 731. The opinion of the Circuit Court of Appeals for the Fifth Circuit is in the record, pages 218-232, inclusive (including dissenting opinion). This opinion of the Circuit Court of Appeals is reported *Illinois Central Railroad Company v. Moore*, and reverse title, 112 F. 2d 959 (dissenting opinion page 967).

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

1. Section 240 (a) of the Judicial Code, U. S. C., Title 28, Section 347, defining the jurisdiction of the Supreme Court of the United States, provides that in any case in the Circuit Court of Appeals it shall be competent for the Supreme Court of the United States upon the petition of any party thereto to require by certiorari that the cause be certified to the Supreme Court. Subsection 8 (a) of said Section 240 provides that application for said writ may be filed within three months after the entry of judgment, and that for good cause said time may be extended not exceeding sixty days by a Justice of said Court.

2. The decision of the Circuit Court of Appeals and the judgment rendered thereon were entered on June 20, 1940 (R. p. 233). Petition for rehearing in the Circuit Court of Appeals was denied on August 8, 1940 (R. p. 40). The time for filing petition for rehearing, supporting brief, and the record ran from said last mentioned date. The record in this Court shows that the petition for writ of certiorari, supporting brief, and the record was filed in this court within the statutory period of three months.

3. The nature of the case and the ruling of the court below which are deemed to bring the case within the jurisdictional provisions relied on have been briefly set forth and stated in the petition for writ of certiorari and will be more fully hereinafter presented in this brief under the headings "Statement of Case" and "Argument."

4. The cases believed to sustain the jurisdiction of this Court have likewise been referred to in the petition for writ of certiorari and will be hereinafter referred to in this brief.

STATEMENT OF THE CASE.

The case has been briefly stated in the petition for writ of certiorari filed herewith and we will undertake only to supplement such statement in so far as may be deemed material to the consideration of the question presented.

Petitioner Moore was a railway switchman employed by respondent railroad company in its Jackson, Mississippi, yards, and as such was a member of the labor union with which respondent railroad company had a contract governing such employment. The effect of the contract as held by the Supreme Court of the State of Mississippi and of the Circuit Court of Appeals in the respective opinions in this case hereinbefore referred to is that no employee shall be discharged without just cause. Petitioner, conceiving that he had been discharged without just cause, filed his suit here involved against the respondent railroad company for a lump sum as damages for breach of his contract of employment.

The suit was first filed in the Circuit Court of the First District of Hinds County, Mississippi, an intermediate trial court of the State of Mississippi. The suit as first filed was for an amount less than the jurisdiction of the National Court. The declaration or complaint so filed and involved appears in the record (R. pp. 1-3, incl.). The contract involved between respondent and the labor union was made an exhibit to the declaration or complaint and likewise appears in the record (R. pp. 4-17, incl.). The suit was and is clearly a suit for damages for the breach of said written contract.

In the Mississippi State Court, amongst other defenses not here involved, respondent railroad company invoked and plead the Mississippi Three Year Statute of Limitations, the same being the statute applicable to suits on open accounts and unwritten contracts (R. p. 39).

Petitioner demurred to said plea assigning as ground for demurrer that the suit was based upon a written con-

tract exhibited with the declaration and not upon a verbal contract (R. p. 38).

The cause came on for hearing, and said state trial court sustained petitioner's demurrer to respondent's said plea of the Mississippi Three Year Statute of Limitations, and thereby held that said Three Year Statute of Limitations was not applicable to petitioner's suit, but said state trial court rendered judgment against petitioner on other pleas which are not here involved (R. pp. 53-55).

Petitioner appealed from said adverse judgment and respondent railroad company filed its cross appeal and complained of the action of the lower court in holding that said Three Year Statute of Limitations was not applicable to petitioner's suit. The cause came on for hearing in the Supreme Court of the State of Mississippi and the Supreme Court of said state reversed the judgment of the lower court and remanded the cause thereto for further proceedings; specifically holding, however, that the Mississippi Three Year Statute of Limitations did not apply, but that the suit was a suit on a written contract and was governed by the Mississippi Six Year Statute of Limitations. *Moore v. Illinois Central Railroad Company*, 180 Miss. 276, 176 So. 593.

When the cause was reversed by the Supreme Court of the State of Mississippi, the same was returned to the lower court for further proceedings therein not inconsistent with said Supreme Court decision. When the same was returned to the lower court, the declaration or complaint was amended and damages were demanded in an amount within the jurisdiction of the National Court (R. pp. 56-57).

Thereupon, petitioner, plaintiff there, being a resident of the State of Mississippi, and respondent railroad company, defendant there, being a non-resident of the State of Mississippi, a diversity of citizenship existed, and upon petition of respondent railroad company, based solely upon the ground of diversity of citizenship, the cause was removed to the United States District Court

for the Jackson Division of the Southern District of Mississippi (R. p. 57).

In the District Court respondent railroad company again invoked and plead the Mississippi Three Year Statute of Limitations, along with other defenses not involved here, in the exact language as the plea to the same effect which had theretofore been filed in the state trial court and had been before the Supreme Court and passed upon by the Supreme Court of the State of Mississippi in *Moore v. Illinois Central Railroad Company, supra*. This plea in the District Court is designated in the record as special plea No. 6 (R. pp. 75-76).

When the cause came on for hearing in the District Court on said plea invoking the Mississippi Three Year Statute of Limitations, the District Court held in accordance with the decision of the Mississippi Supreme Court in the same case (*Moore v. Illinois Central Railroad Company, supra*) that the Mississippi Three Year Statute of Limitations did not apply, but that the suit was governed by the Mississippi Six Year Statute of Limitations and was not barred (See order, R. p. 86). And in a trial on the merits of the case, judgment was rendered in favor of petitioner and against respondent railroad company in the amount of \$4,183.20 (R. p. 200).

From said judgment respondent railroad company appealed to the Circuit Court of Appeals for the Fifth Circuit, which court reversed the District Court and held contrary to the Mississippi Supreme Court in this same case that the Mississippi Three Year Statute of Limitations, and not the Mississippi Six Year Statute of Limitations, is the applicable statute (R. pp. 218-232, Incl.), Mr. Justice Holmes dissenting therefrom.

SPECIFICATION OF ERROR URGED.

Respondent railroad company raised all of the defenses in the District Court which had theretofore been raised in the state court and which were discussed by the Supreme Court of the State of Mississippi in *Moore v. Illinois Central Railroad Company, supra*. The District Court ruled against the contention of the respondent railroad company on each of said defenses, and, as stated, judgment was rendered in favor of petitioner and against respondent railroad company there. On appeal the Court of Appeals for the Fifth Circuit reached the same result as did the District Court on every question involved in the law suit, except the Court of Appeals reversed the District Court on the sole ground that the District Court committed error in holding, as did the Supreme Court of the State of Mississippi in this same case, that the Three Year Statute of Limitations of the State of Mississippi was not the applicable statute (See judgment of Court of Appeals, R. p. 233, opinion of Court of Appeals, R. pp. 218-232, incl., *Illinois Central Railroad Company v. Moore*, 112 F. 2d 959).

So, the only error assigned and to be urged here is the action of the Circuit Court of Appeals in holding that the Three Year Statute of Limitations of the State of Mississippi is applicable in this cause.

ARGUMENT.

The Mississippi statute which fixes the period of limitation on actions on unwritten contracts at three years is Section 2299 of the Code of Mississippi of 1930, which reads as follows:

“Actions to be brought in three years.—Actions on an open account or stated account not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three years next after the cause of such action accrued, and not after.”

Section 2292 of this said Code fixes the period of limitation in other actions, including actions on written contracts, at six years. This Section reads as follows:

“Actions to be brought in six years.—All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.”

When this identical case was first filed in the Mississippi State Court, respondent, who was the defendant there, invoked Section 2299 of the Code of Mississippi of 1930, the Three Year Statute of Limitations, and plead the same in bar of this suit.

In this same law suit, in this identical case, the Supreme Court of the State of Mississippi, the court of last resort in said state, in its decision therein, *Moore v. Illinois Central Railroad Company*, 180 Miss. 276, 176 So. 595, has held that of the two Mississippi statutes of limitations this was an action in which the Mississippi Three Year Statute of Limitations was not applicable, but the Mississippi Six Year Statute was applicable, using the following language:

"The appellee's sixth plea is to the effect that the appellant's cause of action is barred by section 2299, Code of 1930, the 3-year statute of limitations, for the reason that 'the contract of employment between the plaintiff and this defendant was verbal, and the alleged breach of the contract occurred on February 15th, 1933, more than three years before the appellant's suit was begun.'

"The appellant's suit is not on a verbal contract between him and the appellee, but on a written contract made with the appellee, for appellant's benefit, by the Brotherhood of Railroad Trainmen; consequently, section 2299, Code of 1930, has no application, and the time within which the appellant could sue is six years under section 2292, Code of 1930. The demurrer to this plea, therefore, was properly sustained. This question was presented by a cross-appeal by the appellee."

Subsequent to the decision herein by the Mississippi Supreme Court, when this case on the sole ground of diversity of citizenship was removed to the Federal Court, respondent filed the identical plea which had been before the Mississippi Supreme Court and again invoked Section 2299 of the Code of Mississippi of 1930, the Mississippi Three Year Statute of Limitations.

Without these Mississippi statutes of limitations, Section 2299, the three year statute, and Section 2292, the six year statute, there would be no period of limitation to this action which respondent might have invoked. There is no period of limitation fixed thereon by the Federal law.

We respectfully submit that when a state statute of limitations is invoked and applied in a Federal Court sitting in such state, the same should be construed and applied as construed and applied by the decisions of the highest court of such state.

The rule in this regard is announced in the text 25 C. J. 849, as follows:

"State statutes of limitations, as construed by the state court, should be applied in actions at law in a federal court where they are applicable * * *."

And again, 37 C. J. 697, as follows:

"Where a state statute of limitations has been construed by the highest court of the state as *not applying to existing causes of action*, the same construction of the same statute will be adopted by federal courts, if not in conflict with the paramount authority of the Constitution or laws of the United States or with the fundamental principles of justice and common right."

This is but the same rule which has been repeatedly announced and followed by the Supreme Court of the United States and the Court of Appeals of the various circuits long before the decisions of this court in *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188; and *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202, 82 L. Ed. 1290. Certainly when the Federal Court applies the statute of limitations of a state, it must apply the same as construed and as applied by the court of last resort of such state.

Bauserman v. Blunt, 147 U. S. 647, 37 L. Ed. 316;
Balkan v. Woodstock Iron Company, 154 U. S.
 177, 38 L. Ed. 953;

Great Western Telephone Co. v. Purdy, 162 U. S.
 329, 40 L. Ed. 986; and

Security Trust Co. v. Black River Bank, 187 U. S.
 111, 47 L. Ed. 147.

First Circuit, *Andrews v. Bacon*, 38 Fed. 777.

Second Circuit, *Farley v. Carey Show Print Co.*,
 249 Fed. 476.

Third Circuit, *Wilson v. Smith*, 117 Fed. 707; and
First Natl. Bk. v. Anglo, etc., Bank, 37 F. 2d 564.

Fourth Circuit, *Wheeling Bridge Co. v. Reymann*
Brewing Co., 90 Fed. 189;

Brunswick Terminal Co. v. Natl. Bk., 99 Fed.
 635; and

Weems v. Carter, 30 F. 2d 202.

Sixth Circuit, *Salzer v. Consolidation Coal Co.*,
246 Fed. 794.

Eighth Circuit, *Taylor v. Union Pac. R. R. Co.*,
123 Fed. 155;

Young v. Alexander, 29 F. 2d 555; and

Futrell v. Branson, 104 F. 2d 409.

Ninth Circuit, *Bullion & Exchange Bank v. Hegler*, 93 Fed. 890; and

Van Dyke v. Parker, 83 F. 2d 35.

Tenth Circuit, *Arkansas Fuel Oil Co. v. City of Blackwell*, 87 F. 2d 50.

As aptly stated by the Court of Appeals for the Tenth Circuit in *Arkansas Fuel Oil Company v. City of Blackwell*, *supra*, where the Oklahoma statute of limitations was involved; "for limitation of actions is purely statutory, and the Oklahoma statutes mean what the Supreme Court of Oklahoma says they mean."

The Mississippi Supreme Court in this identical case, *Moore v. Illinois Central Railroad Company*, 180 Miss. 276, 176 So. 595, has said that the Three Year Statute of Limitations which respondent has invoked does not apply to this particular suit, but that the Mississippi Six Year Statute is the applicable statute.

Moore v. Illinois Central Railroad Company, *supra*, construing and applying its own statute of limitations in this identical case, stands as the law of the State of Mississippi as declared by its highest judicial tribunal. It has not modified; retracted, altered or amended its opinion. Instead of altering, or modifying, or retracting, or amending said opinion, the Supreme Court of the State of Mississippi has in effect reaffirmed the same. A vigorous suggestion of error was filed attacking said opinion, and the same was by the Court overruled on January 3, 1938. (See official report, 180 Miss. 276).

The decision of the Mississippi Court in *Moore v. Illinois Central Railroad Company*, *supra*, this identical case, should control. *Wichita Royalty Company v. Bank*, 306 U. S. 103, 83 L. Ed. 515.

As it will appear, Section 2299, the Three Year Statute of Limitations of the State of Mississippi, applies to actions on unwritten contracts, and Section 2292 of the Code of Mississippi of 1930, the Six Year Statute of Limitations, applies to actions on written contracts.

Moore v. Illinois Central Railroad Company, *supra*, in holding as hereinbefore set forth is in no sense blazing a trail in Mississippi jurisprudence. The decision therein on the point here involved is in accord with prior decisions of the Mississippi Court. The Supreme Court of the State of Mississippi in two fully considered opinions has held that a suit of the character involved here is a suit on a written contract; a suit for damages for breach of a contract made for the benefit of a class of persons; thus, in effect holding in these two cases that in such a suit the Six Year Statute of Limitations, and not the Three Year Statute of Limitations is applicable. *Gulf & Ship Island Railroad Company v. McGlohn*, 183 Miss. 465, 184 So. 71; *Same Case*, 179 Miss. 396, 174 So. 250; and *Y. & M. V. R. R. Co. v. Sideboard*, 151 Miss. 4, 133 So. 669.

This is not a matter governed by the Federal Constitution or by acts of Congress. The Supreme Court in *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, has said that except in matters so governed the Federal Court sitting in a state should follow the law of such state whether so declared by its legislature or its highest court.

This case reached the Federal Court and reached the Circuit Court of Appeals for the Fifth Circuit solely by reason of diversity of citizenship of the parties.

As has been very aptly stated, the decision in *Erie Railroad Company v. Tompkins*, *supra*, was intended to prevent the arising of a difference in the substantive rights of litigants as a result of the mere accident of diversity of citizenship.

If the decision of the Court of Appeals is allowed to stand, we have this queer situation; a situation typical of the kind the Supreme Court was endeavoring to prevent by its decisions in the *Erie Railroad Company* case, *supra*, and in the *Wichita Royalty Company* case, *supra*. Petitioner's suit is barred by the Three Year Statute of Limitations of the State of Mississippi by the mere accident of diversity of citizenship and because he happened to sue for an amount within the jurisdiction of the Federal Court. His brother in toil, his next door neighbor, has an identical suit against the identical defendant and in which the exact time has elapsed which had elapsed at the time petitioner brought his suit. The only difference is the neighbor's suit is for only \$2,500. He brings his suit in the state court and there it remains, and under the decision of the Supreme Court of the State of Mississippi in *Moore v. Illinois Central Railroad Company*, *supra*, petitioner's own suit, his neighbor's case is not barred and friend neighbor can maintain his suit. In other words, A sues the railroad company in a suit of this character for \$3,000. His suit remains in the state court, and he can maintain it because the Mississippi Supreme Court in applying its own statute has said it is not barred by the Mississippi Three Year Statute of Limitations. B sues the railroad company in the same court, in an identical suit, but he sues for \$3,001. His case is moved to the Federal Court and is barred by the Mississippi Three Year Statute, so B loses and A wins just because the railroad company owes B one dollar more than it owes A. Again, Moore, petitioner, has another fellow worker, another neighbor, who has an identical claim against the Yazoo & Mississippi Valley Railroad Company: This last men-

tioned railroad company is a subsidiary corporation domiciled in the State of Mississippi. He likewise is a resident of the State of Mississippi. He has a claim against his railroad exactly like petitioner's. Even the amount involved is the same. He files his suit in the State Court, and because the accident of diversity of citizenship does not exist, his suit is not barred by the Three Year Statute of Limitations and he can maintain his suit under the authority of the decision of the Supreme Court of the State of Mississippi rendered in petitioner Moore's own law suit.

We do not believe that a situation such as illustrated was ever intended, or that such a situation should or will be allowed to stand. With all deference, if the *Erie Railroad Company case, supra*, and *Wichita Royalty Co. v. Bank, supra*, do not eliminate such a situation, we have wholly misconstrued the intent thereof.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that this Court should grant said petition for a writ of certiorari herein, directing said Honorable Circuit Court of Appeals for the Fifth Circuit to send the record and proceedings in this cause to this Court so that this Court may review and act thereon as of right and according to law and as ought to be done.

Respectfully submitted,

GEO. BUTLER,
Jackson, Mississippi,

GARNER W. GREEN,
Jackson, Mississippi,
Counsel for Petitioner.

BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED

FEB 21 1941

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 550.

EARL MOORE, PETITIONER,

VS.

ILLINOIS CENTRAL RAILROAD COMPANY,
RESPONDENT.

BRIEF ON BEHALF OF PETITIONER,
EARL MOORE.

GEO. BUTLER,
Jackson, Mississippi,
GARNER W. GREEN,
Jackson, Mississippi,
Counsel for Petitioner.

BLANK PAGE

INDEX.

Preliminary	1
Opinions Delivered in the Courts Below	2
Statement of the Case	2
Specification of Error / Urged	5
Argument	6
Conclusion	13
Appendix	15

TABLE OF CASES

Andrews vs. Bacon, 38 Fed. 777 (C. C. A. 1)	8
Arkansas Fuel Oil Co. vs. City of Blackwell, 87 F. 2d 50 (C. C. A. 10)	9
Balkan vs. Woodstock Iron Company, 154 U. S. 177, 38 L. Ed. 953	8
Bauserman vs. Blunt, 147 U. S. 647, 37 L. Ed. 316	8
Brunswick Terminal Co. vs. Natl. Bk., 99 Fed. 635 (C. C. A. 4)	9
Bullion & Exchange Bank vs. Hegler, 93 Fed. 890 (C. C. A. 9)	9
Erie Railroad Company vs. Tompkins, 304 U. S. 64, 82 L. Ed. 1188	8, 11, 12
Farley vs. Carey Show Print Co., 249 Fed. 476 (C. C. A. 2)	8
Fidelity Union Trust Co. vs. Field, 85 L. Ed. 176, both likewise decided December 9, 1940	10
First Natl. Bk. vs. Anglo, etc., Bank, 37 F. 2d 564 (C. C. A. 3)	9
Futrell vs. Branson, 104 F. 2d 409 (C. C. A. 8)	9
Great Western Telephone Co. vs. Prudy, 162 U. S. 329, 40 L. Ed. 986	8
Gulf & Ship Island Railroad Company vs. McGlohn, 183 Miss. 465, 184 So. 71	11
Illinois Central Railroad Company vs. Moore, 112 F. 2d 959	2, 5

Moore vs. Illinois Central Railroad Company, 24 Fed. Supp. 731	2
Moore vs. Illinois Central Railroad Company, 180 Miss. 276, 176 So. 593, 595	2, 3, 4, 5, 6-7, 9, 10, 12
Ruhlin vs. New York Life Insurance Company, 304 U. S. 202, 82 L. Ed. 1290	8
Russell vs. Todd, 309 U. S. 293, 84 L. Ed. 762	8
Salyer vs. Consolidation Coal Co., 246 Fed. 794 (C. C. A. 6)	9
Same Case, 179 Miss. 396, 174 So. 250	11
Security Trust Co. vs. Black River Bank, 187 U. S. 211, 47 L. Ed. 147	8
Six Companies of California vs. Joint Highway District, 85 L. Ed. 159	10
Stoner vs. New York Life Ins. Co., 85 L. Ed. 275, decided December 23, 1940	10
Taylor vs. Union Pac. R. R. Co., 123 Fed. 155 (C. C. A. 8)	9
Van Dyke vs. Parker, 83 F. 2d 35 (C. C. A. 9)	9
Weems vs. Carter, 30 F. 2d 202 (C. C. A. 4)	9
West vs. American Telephone & Telegraph Co., 85 L. Ed. (Advance Sheet) 146, decided December 9, 1940	10
Wheeling Bridge Co. vs. Reymann Brewing Co., 90 Fed. 189 (C. C. A. 4)	9
Wichita Royalty Company vs. Bank, 306 U. S. 103, 83 L. Ed. 515	10
Wilson vs. Smith, 117 Fed. 707 (C. C. A. 3)	9
Y. & M. V. R. R. Co. vs. Sideboard, 161 Miss. 4, 133 So. 669	11
Young vs. Alexander, 29 F. 2d 555 (C. C. A. 8)	9

STATUTES

Code of Mississippi of 1930, Sec. 2292	6, 7
Code of Mississippi of 1930, Sec. 2299	6, 7

TREATISES

25 C. J. 849	8
37 C. J. 697	8

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 550.

EARL MOORE, PETITIONER,

VS.

ILLINOIS CENTRAL RAILROAD COMPANY,
RESPONDENT.

**BRIEF ON BEHALF OF PETITIONER,
EARL MOORE.**

To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:

PRELIMINARY.

This case is before the court on writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment of said court reversing a judgment theretofore rendered in the District Court of the United States for the Jackson Division of the Southern District of Mississippi, in favor of petitioner, Earl Moore, plaintiff there, against respondent, Illinois Central Railroad Company, defendant in said district court. Writ of certiorari granted December 16, 1940.

OPINIONS DELIVERED IN THE COURTS BELOW.

'The opinion' of the Supreme Court of the State of Mississippi is reported, *Moore v. Illinois Central Railroad Company*, 180 Miss. 276, 176 So. 593 (for opinion in full see appendix hereto).

The opinion of the District Court of the United States for the Jackson Division of the Southern District of Mississippi is in the record, pages 196-199, inclusive. This opinion is reported, *Moore v. Illinois Central Railroad Company*, 24 Fed. Supp. 731. The opinion of the Circuit Court of Appeals for the Fifth Circuit is in the record, pages 218-232, inclusive (including dissenting opinion). This opinion of the circuit court of appeals is reported *Illinois Central Railroad Company v. Moore*, and reverse title, 112 F. 2d 959 (dissenting opinion, page 967).

STATEMENT OF THE CASE.

Petitioner Moore was a railway switchman employed by respondent railroad company in its Jackson, Mississippi, yards, and as such was a member of the labor union with which respondent railroad company had a contract governing such employment. The effect of the contract as held by the Supreme Court of the State of Mississippi and of the circuit court of appeals in the respective opinions in this case hereinbefore referred to is that no employee shall be discharged without just cause. Petitioner, conceiving that he had been discharged without just cause, filed his suit here involved against the respondent railroad company for a lump sum as damages for breach of his contract of employment.

The suit was first filed in the Circuit Court of the First District of Hinds County, Mississippi, an intermediate trial court of the State of Mississippi. The suit

as first filed was for an amount less than the jurisdiction of the national court. The declaration or complaint so filed and involved appears in the record (R. pp. 1-3, incl.). The contract involved between respondent and the labor union was made an exhibit to the declaration or complaint and likewise appears in the record (R. pp. 4-17, incl.). The suit was and is clearly a suit for damages for the breach of said written contract.

In the Mississippi state court, amongst other defenses not here involved, respondent railroad company invoked and plead the Mississippi three year statute of limitations, the same being the statute applicable to suits on open accounts and unwritten contracts (R. p. 39).

Petitioner demurred to said plea assigning as ground for demurrer that the suit was based upon a written contract exhibited with the declaration and not upon a verbal contract (R. p. 38).

The cause came on for hearing, and said state trial court sustained petitioner's demurrer to respondent's said plea of the Mississippi three year statute of limitations, and thereby held that said three year statute of limitations was not applicable to petitioner's suit, but said state trial court rendered judgment against petitioner on other pleas which are not here involved (R. pp. 53-55).

Petitioner appealed from said adverse judgment and respondent railroad company filed its cross appeal and complained of the action of the lower court in holding that said three year statute of limitations was not applicable to petitioner's suit. The cause came on for hearing in the Supreme Court of the State of Mississippi and the Supreme Court of said state reversed the judgment of the lower court and remanded the cause thereto for further proceedings; specifically holding in its opinion that the Mississippi three year statute of limitations did not apply, but that the suit was a suit on a written contract and was governed by the Mississippi six year statute of limitations. *Moore v. Illinois Central Railroad Company*, 180 Miss. 276, 176 So. 593.

When the cause was reversed by the Supreme Court of the State of Mississippi, the same was returned to the lower court for further proceedings therein not inconsistent with said Supreme Court decision. When returned to the lower court, the declaration or complaint was amended and damages were demanded in an amount within the jurisdiction of the national court (R. pp. 56-57).

Thereupon, petitioner, plaintiff there, being a resident of the State of Mississippi, and respondent railroad company, defendant there, being a nonresident of the State of Mississippi, a diversity of citizenship existed, and upon petition of respondent railroad company, based solely upon the ground of diversity of citizenship, the cause was removed to the United States District Court for the Jackson Division of the Southern District of Mississippi (R. p. 57).

In the district court respondent railroad company again invoked and plead the Mississippi three year statute of limitations, along with other defenses not involved here, in the exact language as the plea to the same effect which had theretofore been filed in the state trial court and had been before the Supreme Court and passed upon by the Supreme Court of the State of Mississippi in *Moore v. Illinois Central Railroad Company, supra*. This plea in the district court is designated in the record as special plea No. 6 (R. pp. 75-76).

When the cause came on for hearing in the district court on said plea invoking the Mississippi three year statute of limitations, the district court held in accordance with the decision of the Mississippi Supreme Court in the same case, (*Moore v. Illinois Central Railroad Company, supra*) that the Mississippi three year statute of limitations did not apply, but that the suit was governed by the Mississippi six year statute of limitations and was not barred (see order, R. p. 86). And in a trial on the merits of the case, judgment was rendered in favor of petitioner and against respondent railroad company in the amount of \$4,183.20 (R. p. 200).

From said judgment respondent railroad company appealed to the Circuit Court of Appeals for the Fifth Circuit, which court reversed the district court and held contrary to the Mississippi Supreme Court in this same case that the Mississippi three year statute of limitations and not the Mississippi six year statute of limitations is the applicable statute (R. pp. 218-232, incl.), Mr. Justice Holmes dissenting therefrom.

SPECIFICATION OF ERROR URGED.

Respondent railroad company raised all of the defenses in the district court which had theretofore been raised in the state court and which were discussed by the Supreme Court of the State of Mississippi in *Moore v. Illinois Central Railroad Company*, *supra*. The district court ruled against the contention of the respondent railroad company on each of said defenses and, as stated, judgment was rendered in favor of petitioner and against respondent railroad company there. On appeal the Court of Appeals for the Fifth Circuit reached the same result as did the district court on every question involved in the lawsuit, except the court of appeals reversed the district court on the sole ground that the district court committed error in holding, as did the Supreme Court of the State of Mississippi in this same case, that the three year statute of limitations of the State of Mississippi was not the applicable statute (see judgment of court of appeals, R. p. 233, opinion of court of appeals, R. pp. 218-232, incl., *Illinois Central Railroad Company v. Moore*, 112 F. 2d 959).

So, the only error assigned and to be urged here is the action of the circuit court of appeals in holding that the three year statute of limitations of the State of Mississippi is applicable in this cause.

ARGUMENT.

Petitioner Moore was employed in the State of Mississippi. His services were to be performed in the State of Mississippi. His services were actually performed within the State of Mississippi up to the time of his wrongful discharge.

The Mississippi statute which fixed the period of limitation on actions on unwritten contracts at three years is Section 2299 of the Code of Mississippi of 1930, which reads as follows:

"2299. Actions to Be Brought in Three Years.—Actions on an open account or stated account not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three years next after the cause of such action accrued, and not after."

Section 2292 of this said Code fixed the period of limitation in other actions, including actions on written contracts, at six years. This section reads as follows:

"2292. Actions to Be Brought in Six Years—All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after."

When this identical case was first filed in the Mississippi State Court, respondent, who was the defendant there, invoked Section 2299 of the Code of Mississippi of 1930, the three year statute of limitations, and plead the same in bar of this suit. No other limitation was plead or invoked.

In this same lawsuit, in this identical case, the Supreme Court of the State of Mississippi, the court of last resort in said state, in its decision therein, *Moore v.*

Illinois Central Railroad Company, 180 Miss. 276, 176 So. 595, has held that of the two Mississippi statutes of limitations this was an action in which the Mississippi three year statute of limitations was not applicable, but the Mississippi six year statute was applicable, using the following language:

"The appellee's sixth plea is to the effect that the appellant's cause of action is barred by Section 2299, Code of 1930, the three year statute of limitations, for the reason that 'the contract of employment between the plaintiff and this defendant was verbal, and the alleged breach of the contract occurred on February 15th, 1933, more than three years before the appellant's suit was begun.'

"The appellant's suit is not on a verbal contract between him and the appellee, but on a written contract made with the appellee, for appellant's benefit, by the Brotherhood of Railroad Trainmen; consequently, Section 2299, Code of 1930, has no application, and the time within which the appellant could sue is six years under Section 2292, Code of 1930. The demurrer to this plea, therefore, was properly sustained. This question was presented by a cross appeal by the appellee."

Subsequent to the decision herein by the Mississippi Supreme Court, when this case on the sole ground of diversity of citizenship was removed to the federal court, respondent filed the identical plea which had been before the Mississippi Supreme Court and again invoked Section 2299 of the Code of Mississippi of 1930, the Mississippi three year statute of limitations.

Without these Mississippi statutes of limitations, Section 2299, the three year statute, and Section 2292, the six year statute, there would be no period of limitation to this action which respondent might have invoked. There is no period of limitation fixed thereon by the federal law.

We respectfully submit that when a state statute of limitations is invoked and applied in a federal court sitting in such state, the same should be construed and applied

as construed and applied by the decisions of the highest court of such state.

The rule in this regard is announced in the text 25 C. J. 849, as follows:

"State statutes of limitations, as construed by the state court, should be applied in actions at law in a federal court where they are applicable * * *"

And again, 37 C. J. 697, as follows:

"Where a state statute of limitations has been construed by the highest court of the state as not applying to existing causes of action, the same construction of the same statute will be adopted by federal courts, if not in conflict with the paramount authority of the Constitution or Laws of the United States or with the fundamental principles of justice and common right."

This is but the same rule which has been repeatedly announced and followed by the Supreme Court of the United States and the court of appeals of the various circuits long before the decisions of this court in *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188; *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202, 82 L. Ed. 1290; and *Russell v. Todd*, 309 U. S. 293, 84 L. Ed. 762. Certainly when the federal court applies the statute of limitations of a state, it must apply the same as construed and as applied by the court of last resort of such state.

Bauserman v. Blunt, 147 U. S. 647, 37 L. Ed. 316;
Balkan v. Woodstock Iron Company, 154 U. S. 177, 38 L. Ed. 953;

Great Western Telephone Co. v. Prudy, 162 U. S. 329, 40 L. Ed. 986; and

Security Trust Co. v. Black River Bank, 187 U. S. 211, 47 L. Ed. 147.

First Circuit, *Andrews v. Bacon*, 38 Fed. 777.

Second Circuit, *Farley v. Carey Show Print Co.*, 249 Fed. 476.

Third Circuit, *Wilson v. Smith*, 117 Fed. 707; and
First Natl. Bk. v. Anglo, etc., Bank, 37 F. 2d 564.

Fourth Circuit, *Wheeling Bridge Co. v. Reymann
 Brewing Co.*, 90 Fed. 189;

Brunswick Terminal Co. v. Natl. Bk., 99 Fed.
 635; and

Weems v. Carter, 30 F. 2d 202.

Sixth Circuit, *Salger v. Consolidation Coal Co.*,
 246 Fed. 794.

✓ Eighth Circuit, *Taylor v. Union Pac. R. R. Co.*,
 123 Fed. 155;

Young v. Alexander, 29 F. 2d 555 and

Futrell v. Branson, 104 F. 2d 409.

Ninth Circuit, *Bullion & Exchange Bank v.
 Hegler*, 93 Fed. 890; and

Van Dyke v. Parker, 83 F. 2d 35.

Tenth Circuit, *Arkansas Fuel Oil Co. v. City of
 Blackwell*, 87 F. 2d 50.

As aptly stated by the Court of Appeals for the Tenth Circuit in *Arkansas Fuel Oil Company v. City of Blackwell*, *supra*, where the Oklahoma statute of limitations was involved; "for limitation of actions is purely statutory, and the Oklahoma statutes mean what the Supreme Court of Oklahoma says they mean."

The Mississippi Supreme Court in this identical case, *Moore v. Illinois Central Railroad Company*, 180 Miss. 276, 176 So. 595, has said that the three year statute of limitations which respondent has invoked does not apply to this particular suit, but that the Mississippi six year statute is the applicable statute.

Moore v. Illinois Central Railroad Company, *supra*, in which the Mississippi Supreme Court construed and applied its own statute of limitations in this identical case, stands as the law of the State of Mississippi as declared by its highest judicial tribunal. It has not modified, retracted, altered or amended its opinion. Instead of altering, or modifying, or retracting, or amending said

opinion, the Supreme Court of the State of Mississippi has in effect reaffirmed the same. A vigorous suggestion of error was filed attacking said opinion, and the same was by the court overruled on January 3, 1938 (see official report, 180 Miss. 276).

The decision of the Mississippi Court in *Moore v. Illinois Central Railroad Company*, *supra*, this identical case, should control. *Wichita Royalty Company v. Bank*, 306 U. S. 103, 83 L. Ed. 515; *West v. American Telephone & Telegraph Co.*, 85 L. Ed. (Advance Sheet) 146, decided December 9, 1940; *Six Companies of California v. Joint Highway District*, 85 L. Ed. 159; *Fidelity Union Trust Co. v. Field*, 85 L. Ed. 176, both likewise decided December 9, 1940; and *Stoner v. New York Life Ins. Co.*, 85 L. Ed. 275, decided December 23, 1940.

But it is said that the judgment of the Mississippi Supreme Court is not conclusive; that it might alter or reconsider the same. This is purely conjecture. The fact remains that it has not done so. See *Wichita Royalty Co. v. Bank*, *supra*; *West v. Am. Tel. & Tel. Co.*, *supra*; *Six Companies of California v. Joint Highway District*, *supra*; *Fidelity Union Trust Co. v. Field*, *supra*; and *Stoner v. N. Y. Life Ins. Co.*, *supra*.

As it will appear, Section 2299, the three year statute of limitations of the State of Mississippi, applies to actions on unwritten contracts, and Section 2292 of the Code of Mississippi of 1930, the six year statute of limitations, applies to actions on written contracts.

Moore v. Illinois Central Railroad Company, *supra*, in holding as hereinbefore set forth is in no sense blazing a trial in Mississippi jurisprudence. The decision therein on the point here involved is in accord with prior decisions of the Mississippi court. The Supreme Court of the State of Mississippi in two fully considered opinions has held that a suit of the character involved here is a suit on a written contract; a suit for damages for breach of a contract made for the benefit of a class of persons.

The effect of the holding in these two cases being that in such a suit the six year statute of limitations, and not the three year statute of limitations, is applicable. *Gulf & Ship Island Railroad Company v. McGlohn*, 183 Miss. 465, 184 So. 71; *Same Case*, 179 Miss. 396, 174 So. 250; and *Y. & M. V. R. R. Co. v. Sideboard*, 161 Miss. 4, 133 So. 669.

This is not a matter governed by the Federal Constitution or by acts of Congress. The Supreme Court in *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, has said that except in matters so governed the federal court sitting in a state should follow the law of such state whether so declared by its legislature or its highest court.

This case reached the federal court and reached the Circuit Court of Appeals for the Fifth Circuit solely by reason of diversity of citizenship of the parties.

As has been very well stated, the decision in *Erie Railroad Company v. Tompkins*, *supra*, was intended to prevent the arising of a difference in the substantive rights of litigants as a result of the mere accident of diversity of citizenship.

If the decision of the court of appeals is allowed to stand, we have this queer situation; a situation typical of the kind the Supreme Court was endeavoring to prevent by its decisions in the *Erie Railroad Company Case*, *supra*, and in the subsequent cases mentioned. Petitioner's suit is barred by the three year statute of limitations of the State of Mississippi by the mere accident of diversity of citizenship and because he happened to sue for an amount within the jurisdiction of the federal court. His brother in toil, his next door neighbor, has an identical suit against the identical defendant and in which the exact time has elapsed which had elapsed at the time petitioner brought his suit. The only difference is the neighbor's suit is for only \$2,500. He brings his suit in the state court and there it remains, and under the decision of the

Supreme Court of the State of Mississippi in *Moore v. Illinois Central Railroad Company, supra*, petitioner's own suit, his neighbor's case is not barred and friend neighbor can maintain his suit.

Further illustrating:

A sues the railroad company in a suit of this character for \$3,000. His suit remains in the state court, and he can maintain it because the Mississippi Supreme Court in applying its own statute has said it is not barred by the Mississippi three year statute of limitations. B sues the railroad company in the same court, in an identical suit, but he sues for \$3,001. His case is moved to the federal court and is barred by the Mississippi three year statute, so B loses and A wins just because the railroad company owes B one dollar more than it owes A.

Again, Moore, petitioner, has another fellow worker, another neighbor, who has an identical claim against the Yazoo & Mississippi Valley Railroad Company. This last-mentioned railroad company is a subsidiary corporation domiciled in the State of Mississippi. He likewise is a resident of the State of Mississippi. He has a claim against his railroad exactly like petitioner's. Even the amount involved is the same. He files his suit in the state court, and because the accident of diversity of citizenship does not exist, his suit is not barred by the three year statute of limitations and he can maintain his suit under the authority of the decision of the Supreme Court of the State of Mississippi rendered in petitioner Moore's own lawsuit.

We do not believe that a situation such as illustrated was ever intended, or that such a situation should or will be allowed to stand. With all deference, if the *Erie Railroad Company Case, supra*, and the subsequent cases mentioned do not eliminate such a situation, we have wholly misconstrued the intent thereof.

CONCLUSION.

It is, therefore, respectfully submitted that the Circuit Court of Appeals for the Fifth Circuit is in error in holding that the Mississippi three year statute of limitations is applicable in this case, contrary to the holding of the Supreme Court of the State of Mississippi in this identical case. The judgment of the court of appeals reversing judgment of the district court in favor of petitioner and against respondent is erroneous.

Respectfully submitted,

GEO. BUTLER,
Jackson, Mississippi,
GARNER W. GREEN,
Jackson, Mississippi,
Counsel for Petitioner.

Certificate.

Service of the foregoing Brief for Petitioner is hereby acknowledged, this the _____ day of _____, 1941.

JAMES L. BYRD,
Jackson, Mississippi,
Of Counsel for Respondent.

BLANK PAGE

APPENDIX.

The opinion of the Supreme Court of the State of Mississippi in the case before the court, Moore v. Illinois Central Railroad Company, No. 32,860, decided November 8, 1937, reported 180 Miss. 276, 176 So. 593, is as follows:

SMITH, Chief Justice.

The appellant sued the appellee on an alleged breach of a contract of employment. The appellee filed six special pleas. Demurrers by the appellant to the first four pleas were overruled. The appellant replied to the fifth plea and a demurrer to his replication was sustained, as was also his demurrer to the appellee's sixth plea. The appellant declined to plead further, and judgment final against him was rendered.

The declaration alleges, in substance, that on and long prior to February 15, 1933, the plaintiff was a member of the Brotherhood of Railroad Trainmen, with which the defendant had entered into a contract which provided the rules, rates of pay, etc., for trainmen employed by it. That the plaintiff had been employed by the defendant as a trainman since June 2, 1926, and on November 13, 1926, the defendant, in accordance with its contract with the Brotherhood of Railroad Trainmen, published a seniority roster for its trainmen, giving the plaintiff No. 52 thereon. Under the provisions of the contract, the trainmen were given work by the defendant according to their seniority on this roster, and, among other things, the contract provided that no employee should be discharged by the defendant without just cause. That although the plaintiff had rendered the defendant faithful and efficient service, and was ready, willing, and able to so continue, he was arbitrarily discharged by the defendant on February 15, 1933, since which he has been unable to

obtain employment, to the damages of the plaintiff in the sum of \$3,000. The Brotherhood of Railroad Trainmen's contract was filed as an exhibit to the declaration, and is practically identical with the one under consideration in *Moore v. Yazoo & M. V. R. Co.*, 176 Miss. 65, 166 So 395, and *McGlohn v. Gulf & S. I. R. R.* (Miss.) 174 So. 250.

[1] The first three of the appellee's pleas allege, in substance: The first plea, that the employment of the plaintiff was not for a definite time, and was terminable at will; the second plea, that the contract sued on is unilateral, there being no agreement on the part of the plaintiff to perform any services whatever for the defendant, and was without consideration; the third plea, that the contract sued on was not one of hiring between the plaintiff and the defendant, but was merely a schedule of wages governing yardmen and switchmen, and that by it no switchman was employed for any specific period, no switchman agreed to perform any service for the defendant for any specified time, and, therefore furnishes no basis for a recovery by the plaintiff.

These pleas seem to be, in fact, demurrers, but aside from that, the demurrers thereto should have been sustained under *McGlohn v. Gulf & S. I. R. R.*, supra, wherein the court held that a contract by a labor union with an employer, similar to the one here, was: (1) Valid; (2) that a member of the labor union which made the contract could sue thereon, although he had not, himself, agreed to work for the employer for any definite time; and (3) could not be discharged by the employer at will. That case was decided after the trial in the court below of the case now under consideration.

[2] The fourth plea set forth a provision of the contract sued on, reading as follows: "(d) Yardmen or switchtenders taken out of the service are censured for cause, shall be notified by the Company of the reason therefor, and shall be given a hearing within five days

after being taken out of the service, if demanded, and if held longer shall be paid for all time so held at their regular rate of pay. Yardmen or switchtenders shall have the right to be present and to have an employee of their choice at hearings and investigations, to hear the testimony, and ask questions which will bring out facts pertinent to the case. They shall also have the right to bring such witnesses as they desire to give testimony, and may appeal to higher officers of the Company in case the decision is unsatisfactory. Such decision shall be made known within three days at New Orleans and at other points ten days after the hearing, or yardmen or switchtenders shall be paid for all time lost after the expiration of three days at New Orleans and ten days at other points. In case the suspension or dismissal or censure is found to be unjust, yardmen or switchtenders shall be reinstated and paid for all time lost." It then alleges, in substance, that when the appellant was discharged on February 15, 1933, he was notified thereof, in writing, by the defendant's superintendent, whereupon the plaintiff notified the superintendent in writing that he desired a hearing on his discharge, which request was complied with by the superintendent. While the plea does not so allege, it is clear therefrom that the superintendent declined to reinstate the plaintiff, whereupon he gave written notice to the defendant that he desired to appeal from this ruling of the superintendent. The defendant, through its proper officers, advised the plaintiff that a hearing on this appeal would be accorded him on a named date, but the plaintiff failed to appear and abandoned his appeal, because of which he is without the right to maintain this suit.

The appellant is not seeking to be restored to the appellee's employment, nor does his complaint involve any question of discipline or policy arising under the contract. It includes only his right, vel non, to damages, because of his alleged discharge by the appellee, for the determina-

tion of which the courts are open to him without his having exercised his right to attempt to gain his reinstatement in the appellee's employ by appealing from its superintendent to his superior officers. Independent Order of Sons & Daughters of Jacob v. Wilkes, 98 Miss. 179, 53 So. 493, 52 L.R.A. (N.S.) 817; Eminent Household of Columbian Woodmen v. Ramsey, 118 Miss. 454, 79 So. 351, and Eminent Household of Columbian Woodmen v. Payne, 18 Ala.App. 23, 88 So. 454. The demurrer to this plea should have been sustained.

[3] The fifth plea is one of res judicata, and alleges, in substance, that on October 15, 1932, the plaintiff sued the defendant in the First district of Hinds county, in a cause appearing there as No. 8232, and on February 23, 1933, filed an amended declaration therein alleging that he had been given a lower place on the defendant's seniority roster, resulting in his being, in effect, discharged, by reason of which he had been damaged. After the filing of this amended declaration, the defendant filed the following third special plea: "Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration herein, says that in any event, the plaintiff is not entitled to recover pay for any time after the 15th day of February, 1933, because it says that on said 15th day of February, 1933, it notified the said plaintiff, Earl Moore, in writing, that his services were no longer desired, and that his employment was at an end, and his said employment with this defendant did end on said date and any right the said Moore might have had to work for the defendant ceased on said date." To this plea, the appellant replied as follows: "And now comes the plaintiff and for replication to the third special plea of the Illinois Central Railroad Company heretofore filed herein says that nothing therein contained should defeat or prevent the maintenance of plaintiff's cause of action, because it is alleged in the declaration and in the exhibits annexed thereto un-

der Article 17 of said Exhibit, the following, 'No switchman will be discharged or suspended without just cause,' and said special plea does not allege that the said defendant, Illinois Central Railroad, had any sufficient cause of firing the said plaintiff, who was a switchman and the said plaintiff does hereby allege and aver that the only reason that he was fired was because that he had filed this lawsuit seeking a redress of his wrongs in the defendants, and plaintiff avers that the filing of a lawsuit to compel the courts to perform their contracts is not sufficient cause within the meaning of said contract of employment. All of which the defendant is ready to verify." Issue on this replication was joined by consent, and the cause proceeded to trial resulting in a verdict for the defendant, and a judgment that the plaintiff recover nothing.

The replication of the plaintiff to this plea of res judicata sets forth, among other things, that: "It was alleged in said declaration, in suit No. 8232, and the following allegation constituted the gist of plaintiff's action herein, that the said defendants therein had breached a contract between the Switchman's Union of North America, of which plaintiff was, at the time he went to work for the Alabama & Vicksburg Railway Company, a member, in that he had been given a lower place on the seniority roster of both defendants in their Jackson yards than the place to which he was entitled under the contract, yet plaintiff avers that the basis of his cause of action in said cause, to-wit, No. 8232, was breach of the contract originally entered into between the said Alabama & Vicksburg Railway Company and the Switchman's Union of North America, for a failure of this defendant and the Yazoo and Mississippi Valley Railroad Company to give him the place upon the seniority roster to which he was entitled, the contract between the Switchman's Union of North America, and the Alabama & Vicksburg Railway Company having been expressly assumed as alleged in the pleadings in said cause by the defendants

therein, and all other matters alleged, either in the declaration or in any subsequent pleadings filed by either party thereto, did not form the basis of plaintiff's cause of action therein, but went merely to show and explain the extent of damages suffered by said plaintiff, or any attempt by the defendants to limit said damages. That the cause of action between the Illinois Central Railroad Company and this plaintiff in said cause No. 8232, is in no way identical with the cause of action here sued on, because the cause of action here sued on is based not upon the Switchman's Union contract, but a contract between this defendant and the Brotherhood of Railroad Trainmen. The basis of this suit is not a failure to give plaintiff a place upon the seniority roster to which he conceived he was entitled, but is a suit for his wrongful discharge under a contract of hire. Plaintiff further alleges that said plea constitutes no defense because cause No. 8232 was decided by this court and affirmed by the Supreme Court [Moore v. Yazoo & M. V. R. Co., 176 Miss. 65, 166 So. 395] upon the grounds that the contract therein sued on provided that within thirty days after the promulgation of the seniority list, the seniority list therein sued on having been promulgated in November, 1928, that any person not being satisfied with the number given him thereon should, within thirty days after the promulgation of said list, file a written protest; that this the plaintiff in cause No. 8232 failed to do personally within the time required by the contract between the Switchman's Union of North America and the Alabama & Vicksburg Railway Company, and for that reason a directed verdict was rendered against said plaintiff, which was affirmed by the Supreme Court of the State of Mississippi, a copy of the opinion of the Circuit Court and the opinion of the Supreme Court both being attached hereto marked Exhibits 'B' and 'C' respectively, and prayed to be considered a part hereof as fully and completely as if copied herein, and the issue herein involved

has never been decided upon its merits either by this court or any other court. All of which the plaintiff is ready to verify." The declaration in the former suit, filed as an exhibit to this replication, is in accord therewith.

It appears from the appellee's fifth plea that this discharge of the appellant was pleaded by it in the former suit, not in bar of the action, but only in bar of the right of the appellant "to recover pay for any time after the 15th day of February, 1933," the date of his discharge.

The appellee says that the wrongfulness, *vel non*, of the appellant's discharge by it on February 15, 1933, was one of the questions presented and litigated in the former suit, and was decided by the verdict and judgment there rendered.

The appellant admits that this question was presented in the former suit by the appellee's plea, but says that it did not and could not have entered into the verdict and judgment rendered; and, further, that the evidence necessary to support his there cause of action differed, in material aspects, from that necessary to support his cause of action here sued on.

It appears from the replication to this plea of *res judicata*, and from the opinions of the trial and the Supreme Court, to which both the appellant and the appellee, in their pleadings, refer, that the trial court directed the jury to return a verdict for the defendant, but, in so doing, did not and could not have considered and determined the wrongfulness, *vel non*, of the appellant's discharge by the appellee on February 15, 1933; and, further, that the trial court directed the jury's verdict only on the ground that the appellant had no cause of action because of his having been given the wrong number on the appellee's roster of workmen, and therefore could recover nothing. Had a recovery been allowed for the time intervening between the publication of the appellee's roster and the appellant's discharge on February 15, 1933, a different question would be here presented. The judgment in the former suit is not *res judicata* here.

We have left out of view the fact that the appellant here sues on a contract made with the appellee by the Brotherhood of Railroad Trainmen, and in the former suit on a contract made with appellee by the Switchman's Union of North America, the provisions of which are similar.

The appellant's demurrers to the first four pleas should have been sustained, and the appellee's demurrer to the appellant's replication to the fifth plea should have been overruled.

[4] The appellee's sixth plea is to the effect that the appellant's cause of action is barred by section 2299, Code of 1930, the 3-year statute of limitations, for the reason that "the contract of employment between the plaintiff and this defendant was verbal, and the alleged breach of the contract occurred on February 15th, 1933, more than three years before the appellant's suit was begun."

The appellant's suit is not on a verbal contract between him and the appellee, but on a written contract made with the appellee, for appellant's benefit, by the Brotherhood of Railroad Trainmen; consequently, section 2299, Code of 1930, has no application, and the time within which the appellant could sue is six years under section 2292, Code of 1930. The demurrer to this plea, therefore, was properly sustained. This question was presented by a cross-appeal by the appellee.

Reversed and remanded.

BLANK PAGE

ant
the
ner
ch-
ich

as
er
ld

at
09,
a-
n-
ch
in

BLANK PAGE

e-
ct
ie
on
ie
er
a,
is

FILE COPY
19 11
CHARLES LINCOLN DODDLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 550.

EARL MOORE, PETITIONER,

VS.

**ILLINOIS CENTRAL RAILROAD COMPANY,
RESPONDENT.**

**REPLY BRIEF ON BEHALF OF PETITIONER,
EARL MOORE.**

✓ **GEO. BUTLER,**
✓ Jackson, Mississippi,
✓ **GARNER W. GREEN,**
Jackson, Mississippi,
Counsel for Petitioner.

BLANK PAGE

INDEX

Preliminary	1
Argument	3
Conclusion	10

TABLE OF CASES

Eminent Household of Woodmen vs. Ramsay, 118 Miss. 454, 79 So. 351	5
Estes et al. vs. Union Terminal Company, 89 F. 2d 768	5
Independent Order, etc., vs. Wilkes, 98 Miss. 179, 53 So. 403	5
Johnson vs. United States, 225 U. S. 405, 56 L. Ed. 1142	8
Louisville, etc., R. R. Co. vs. Mottley, 219 U. S. 467, 55 L. Ed. 297	8
Moore vs. Illinois Central Railroad Company, 180 Miss. 276, 176 So. 593	9
Stevenson vs. N., O. & N. E. R. Co., 180 Miss. 147, 177 So. 509	3
Story Parchment Company vs. Paterson Parchment Paper Company, 282 U. S. 555, 75 L. Ed. 544	2
United States vs. Stevenson, 215 U. S. 190, 54 L. Ed. 153	8

STATUTES

Mississippi Constitution, Sec. 24	6
U. S. C. A., Sec. 146, Tit. 45	3, 4
U. S. C. A., Sec. 153, Tit. 45	2

TREATISES

American Jurisprudence, Vol. 1, p. 411, Sec. 12	8
59 Corpus Juris 1124	7
59 Corpus Juris 1130	7
59 Corpus Juris 1973	6-7

BLANK PAGE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 550.

EARL MOORE, PETITIONER,

VS.

ILLINOIS CENTRAL RAILROAD COMPANY,
RESPONDENT.

REPLY BRIEF ON BEHALF OF PETITIONER, EARL MOORE.

To: the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

PRELIMINARY.

The sole error urged in petition for certiorari herein was the action of the Circuit Court of Appeals for the Fifth Circuit in holding that the three year statute of limitations of the State of Mississippi is applicable in this cause.

This is the sole error assigned here and is, accordingly, the sole question discussed in petitioner's original brief filed herein.

Respondent did not file cross petition for certiorari, but in its brief filed herein undertakes to support the judgment of the circuit court of appeals which reversed the judgment of the district court in petitioner's favor upon a ground as to which the court of appeals found against respondent. Apparently, this procedure is permitted under the authority of previous decisions of this court, of which *Story Parchment Company v. Paterson Parchment Paper Company*, 282 U. S. 555, 75 L. Ed. 544, is typical.

The asserted ground is that the circuit court of appeals was in error in holding that the district court properly sustained petitioner's demurrer to a so-called plea in abatement filed in said district court by respondent.

This plea in abatement is found in the record (Tr. pp. 60-62, inclusive).

Petitioner's demurrer to said plea in abatement appears in the record (Tr. pp. 63-64, inclusive).

The substance of this plea in abatement is that this action at law cannot be maintained because of the failure on the part of petitioner to pursue the procedure provided by the provisions of the contract sued on; and, further, because the petitioner elected to propound his claim in a court of law rather than before the National Railroad Adjustment Board created by act of Congress of June 21, 1934, Title 45, United States Code Annotated, Section 153.

ARGUMENT.

Moore, petitioner, was discharged by the railroad, respondent, on February 15, 1933. Hearing was had before the local railroad officials on February 20, 1933. Any appeal from such hearing had long since been abandoned prior to the creation of the National Railroad Adjustment Board on June 21, 1934. There was nothing whatever pending in connection with petitioner's claim from February 20, 1933, until September 15, 1936, when the lawsuit now before the court was filed.

If petitioner's claim, as evidenced by this lawsuit, was ever such a dispute as it was contemplated came within the jurisdiction of the National Railroad Adjustment Board, which fact we deny, then in no event was the same a pending dispute at the time of the creation of said National Railroad Adjustment Board by act of Congress of June 21, 1934. See *Stevenson v. N., O. & N. E. R. R. Co.*, 180 Miss. 147, 177 So. 509.

When petitioner's cause of action arose, and during the time the same might be termed a pending dispute, there was in force a Railway Labor Act of May 20, 1926, Title 45, Section 146, *et seq.*, United States Code Annotated, and there was in existence the boards of adjustment and of mediation created thereunder.

It is perfectly apparent that the Railway Labor Act of 1926, which was the act in force at the time this cause of action accrued, created a board of arbitration and a board of mediation available for the voluntary submission of disputes of a certain nature between railroads and employees. The submission of disputes even of the kind and character contemplated by the act to the boards of arbitration provided was in no sense mandatory, and the boards were available to the parties as boards of

arbitration only when there was a written agreement or contract between the parties for the submission of such disputes to such boards for arbitration. See the first provision, Provision (a), Subsection 3, Section 146, also, Provision A, Subsection 8, of said Section, Title 45. No such contract or agreement is alleged by the plea to have been in existence, or is exhibited thereto.

It will be remembered that this is a straight-out action at law, a suit for damages for the alleged wrongful breach of a contract of employment, which said breach arose on February 15, 1933; a suit by a discharged employee because he was discharged in violation of his contract of employment. He is in no sense seeking reinstatement. This is not a dispute growing out of a grievance, or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions. After February 15, 1933, petitioner was no longer an employee of respondent.

Subsection 2, Section 146, Title 45, states that the adjustment board might act as arbitrator between a carrier and its employees in disputes of certain nature, "in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Subsection 5, Section 146, Title 45, provides that the board of mediation might proffer its services in disputes between carriers and employees concerning rates of pay, rules or working conditions, etc.

Can it be said that this suit for damages by a discharged employee for a breach of his contract of employment was such a dispute as was in the contemplation of said Railway Labor Act, even if the written agreement for arbitration had been in effect and even if the arbitration or mediation as provided by said act had been mandatory.

The purpose of the Railway Labor Act is as stated by the court in *Estes et al. v. Union Terminal Company*, 89 F. 2d 768:

"To facilitate peaceful, orderly adjustments of disputes between railroads and their employees, to prevent strikes and other disturbances."

We respectfully submit that a suit as is this by a discharged employee for damages for a wrongful breach of a contract of employment does not come within the purpose as set forth.

There is nothing involved here, except a personal property right, and "the courts will take hold of and protect personal and property rights in whatever way it may be sought to disregard them." This rule is supported by the authorities generally, of which *Independent Order, etc., v. Wilkes*, 98 Miss. 179, 53 So. 403, *Eminent Household of Woodmen v. Ramsay*, 118 Miss. 454, 79 So. 351, and authorities cited, are typical.

Decisions which do not involve the individual personal and property rights of an individual which he has sought to enforce in court are not persuasive. Here a discharged employee, who by reason of such discharge has long since lost all his rights as an employee, has brought suit in a court of law seeking to recover a lump sum of money as damages for his wrongful discharge in breach of his contract of employment.

The rights of an individual to appeal to the courts for the redress of wrongs and of trial by jury are rights which, under our Constitution, are inalienable, and to construe the Railway Labor Act as taking away this right makes the same violative of both the Seventh and Fourteenth Amendments to the Federal Constitution. To take away such rights to appeal to the courts of the State of Mississippi is violative of Section 24 of the State Constitution, which is as follows:

"Section 24. All courts shall be open; and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial or delay."

A provision similar thereto is found in the constitutions of most of the states of the Union.

It was clearly not the purpose of the Railway Labor Act of 1926; which was the act in force at the time the instant cause of action accrued, to take away from a discharged employee who was no longer an employee the right to resort to the court in such a case as involved here. And, while we do not believe the Act of 1934 creating the National Railroad Adjustment Board is in any manner involved here, there being no pending dispute at the time of the creation of said board, likewise it is clearly not the intention of such act to deprive an individual, discharged employee of his right to resort to a court of law to enforce his individual property right by a suit for damages for his wrongful discharge in breach of his contract of employment.

While this is not such a dispute between a carrier and its employees, as is contemplated by either the Railway Labor Act of 1926 or the Railway Labor Act of 1934, both of said labor acts, and particularly is this true of the Act of 1926, are permissive only.

The rule of construction is:

"Words of permissive character may be given a mandatory significance to effect the legislative intent, and when the terms of a statute are such that they cannot be made effective to the extent of giving each and all of them some reasonable operation, without construing the statute as mandatory, such construction should be given; but the power to construe a statute permissive in form as mandatory should be exercised with reluctance, and only where the

5 7
clear intent, as shown by the context, demands such construction."

59 Corpus Juris 1073.

In 59 Corpus Juris, page 1124, *et seq.*, the rule of construction applicable is further announced:

"Except where the rule has been changed by express enactment, or statutes are remedial in part, or where the legislative intent is not ambiguous, obscure, or doubtful, all statutes in derogation of the common law or common rights, are to be construed strictly; and as an implied abrogation of the common law is not favored, these statutes will not be construed to change the common law beyond what is expressly declared, or is necessarily implied, as from the fact that it covers the whole subject matter."

And again 59 Corpus Juris 1130:

"Procedural statutes should be given a construction, if possible, which will preserve the essentials of harmony and consistency in the judicial system, and the established practice under a statute should not be changed except by the clearly expressed will of the lawmakers, nor should they be construed to take away a long-established and frequently used remedy unless they contain a clear and direct expression of an intention to do so. But statutes which take away, change, or diminish fundamental rights, statutory remedies for rights unknown to the common law, and statutes which provide new and extraordinary remedies, must be construed strictly, both as to the cases embraced within their terms and as to the methods to be pursued."

At the time of the passage of the Railway Labor Act, there can be no doubt but that under the existing law and the existing decisions, petitioner might have maintained this action for damages for breach of contract. The Railway Labor Acts simply create a new permissive remedy for an existing right. The Railway Labor Acts do not by their terms take away from petitioner the remedy af-

forded to him by the existing law of taking his cause of action to the courts.

The rule of statutory construction in such a case is: "A statute creating a new remedy for an existing common-law cause of action, containing no express or implied negative, does not, as a rule, take away the common-law remedy, but the party may still sue at common law as well as upon the statute. In such cases, the statutory remedy will be regarded as merely cumulative."

The quotation is from American Jurisprudence, Volume 1, page 411, Section 12. See authorities there cited Note 12, including *United States v. Stevenson*, 215 U. S. 190, 54 L. Ed. 153.

The Solicitor General of the United States in his able memorandum brief filed herein has discussed the substitution of the word "may" in the 1934 act for the demanding word "shall" as contained in the prior acts. This occurs to us as significant, in view of the situation as pointed out by the Solicitor General.

As we understand the rule of statutory construction in this regard, it is that the legislature must be presumed to know both the language employed in the former acts and the judicial construction placed upon them; and if in a subsequent statute on the same subject it uses different language in the same connection, the courts must presume that a change of the law was intended. *Louisville, etc., R. R. Co. v. Mottley*, 219 U. S. 467, 55 L. Ed. 297; *Johnson v. United States*, 225 U. S. 405, 56 L. Ed. 1142; etc.

Section 153, Subsection 1, of the 1934 Act, gives jurisdiction to the adjustment board in disputes between employees or groups of employees and a carrier growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on June 21, 1934, and provides that such disputes "shall be handled in the usual manner up to and including the

chief operating officer of the carrier designated to handle such disputes; but failing to reach an agreement in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the "adjustment board," etc.

We have pointed out that this is not such a dispute as contemplated by the act, and that this was not a dispute or case pending and unadjusted on June 21, 1934.

It is apparent that in any event handling in the usual manner through the operating officers of the carrier is a condition precedent to reference to the adjustment board.

Respondent in the state court in which this action was originally tried and in the district court raised the question of the right of petitioner to maintain this suit until he had handled by appeal to the operating officers of the carrier. This question was raised in the state court by respondent's plea designated as special plea No. 4, and was likewise raised in the federal district court by plea similarly designated.

The Mississippi State Supreme Court in its decision in this case, *Moore v. Illinois Central Railroad Company*, 180 Miss. 276, 176 So. 593, held as did the circuit court of appeals that compliance with such provision was not a mandatory condition precedent to the maintaining of this cause of action. The state court's discussion of this question is found in the opinion of the court. The opinion of the Supreme Court of the State of Mississippi in full is included in petitioner's original brief as an appendix thereto. This particular discussion is found beginning last paragraph page 16 of said appendix. The holdings of the Mississippi Court and of the circuit court of appeals on the point find ample support in the authorities, of which the authorities cited in the opinion of the Mississippi court are typical.

If compliance with the condition precedent of appealing to the operating officers of the carrier, where the

word "shall" is used in the Labor Act of 1934, is not a mandatory requirement, then certainly the resort to the adjustment board cannot be said to be a mandatory requirement.

Due to the able discussion by the Solicitor General of the United States in his memorandum brief filed herein, we do not consider further discussion of this question necessary.

The Solicitor General has recognized the handicap under which petitioner would necessarily be placed in undertaking to carry his case through the necessary procedure to the adjustment board. We assert as a fact that, under the existing circumstances, such would be utterly impossible.

The Solicitor General has suggested that if the court should hold that the adjustment board has primary jurisdiction that this cause not be finally dismissed, but that an opportunity be afforded to petitioner to present his case through the required procedure to the adjustment board. A competent court has adjudicated that petitioner was wrongfully discharged, and that he is entitled to recover damages for a breach of his contract of employment. With all deference, we say that it would be grossly unfair to require this citizen, necessarily of limited means, to resort to such a procedure, which, on its face and under the circumstances, is impossible.

Conclusion.

We again, therefore, respectfully submit that the Circuit Court of Appeals for the Fifth Circuit is in error in holding that the Mississippi three year statute of limitations is applicable in this case, contrary to the holding of the Supreme Court of the State of Mississippi in this identical case, and that the judgment of the court of appeals reversing the judgment of the Mississippi Supreme

1 Court in favor of petitioner and in favor of respondent
is erroneous.

Respectfully submitted,

GEO. BUTLER,
Jackson, Mississippi,

GARNER W. GREEN,
Jackson, Mississippi,

Counsel for Petitioner.

Certificate.

Service of the foregoing Brief for Petitioner is hereby
acknowledged, this the _____ day of March, 1941.

JAMES L. BYRD,
Jackson, Mississippi,

Of Counsel for Respondent.

BLANK PAGE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 550.

EARL MOORE,
Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

**RESPONSE OF ILLINOIS CENTRAL RAILROAD COM-
PANY TO PETITION FOR WRIT OF CERTIORARI
OF EARL MOORE AND BRIEF IN SUPPORT
THEREOF.**

JAMES L. BYRD,
Jackson, Mississippi,
CLINTON H. McKAY,
Memphis, Tennessee,
Attorneys for Respondent.

E. C. CRAIG and
V. W. FOSTER, of Chicago, Illinois,
LUCIUS E. BURCH, JR., of Memphis, Tennessee,
Of Counsel.

BLANK PAGE

TABLE OF CONTENTS

Statement of Case.....	1
Proceedings on Respondent's Plea in Abatement	2
I. Circuit Court of Appeals Rightly Held That Plea of Three Years' Statute of Limitations Should Not Have Been Stricken on Demurrer.....	3
Whether Petitioner Could Sue on Schedule of Wages and Rules Governing Yardmen and Switchtenders Without Proving His Individual Contract of Employment Was Not a Matter of Local Law.....	4
The Labor Union Agreement Is Not in and of Itself a Contract of Employment. Petitioner's Indi- vidual Contract of Employment Neither Al- leged Nor Proved To Be Wholly in Writing.....	6
Circuit Court of Appeals, After Removal and on Second Appeal, Sat as Successor of Mississippi Supreme Court and Was Free to Recede From Former Opinion if Satisfied of Its Incorrectness	10
II. Judgment of Circuit Court of Appeals Is Correct in Any Event Because Defense Set up by Respond- ent's Plea in Abatement Is Good.....	12
Conclusion	18
Appendix A	19
Appendix B	20

TABLE OF CASES

Adams v. Southern P. Co., 204 Cal. 63, 266 Pac. 541, 57 A. L. R. 1066.....	16
Bell v. Western Ry., 228 Ala. 328, 153 So. 434.....	16
Brewer, et al., v. Browning, 115 Miss. 358, 76 So. 267....	4, 11
Caulfield v. Yazoo & M. V. R. Co., 170 La. 155, 127 So. 585.....	16
City of Hattiesburg v. Cobb Bros., 174 Miss. 20, 163 So. 676.....	4, 9
Cousins v. Pullman Co., (Tex. Civ. App.) 72 S. W., 2d. 356.....	16
Estes, et al., v. Union Terminal Co., 89 F. 2d. 768 (5th Cir.)	16
Gulf & Ship Island R. Co. v. McGlohn, 179 Miss. 396, 174 So. 250.....	8
Gulf & Ship Island R. Co. v. McGlohn, 183 Miss. 465, 184 So. 71.....	8
Harrison v. Pullman Co., 68 F. 2d. 826 (8th Cir.).....	15
Helvering v. Gowran, 302 U. S. 238, 82 L. ed. 224.....	12
Illinois Central R. Co. v. Moore, 112 F. 2d. 959 (5th Cir.)	5, 7
Maxwell v. Harkelroad, 77 Miss. 456, 27 So. 990.....	4, 11
Messenger v. Anderson, 225 U. S. 436, 56 L. ed. 1152....	11
Moore v. I. C. R. Co., 180 Miss. 276, 176 So. 593.....	4, 7
Norfolk & W. Ry. Co. v. Harris, 260 Ky. 132, 84 S. W. 2d. 69.....	16
Northern State Contracting Co. v. Swope, 271 Ky. 140, 111 S. W. 2d. 610.....	14
Reed v. St. Louis S. W. R. Co. (Mo. App.) 95 S. W. 2d. 837.....	16

TABLE OF CASES—Cont'd

St. Louis, B. & M. Ry. Co. v. Booker (Tex. Civ. App.) 5 S. W. 2d. 856.....	16
Swilley v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 96 S. W. 2d. 105.....	16
Virginia Ry. Co. v. System Federation, No. 40, 300 U. S. 515, 81 L. ed. 789.....	10
Wichita Royalty Co. v. City Bank, 306 U. S. 103, 83 L. ed. 515.....	4, 11
Wyatt v. Kansas City Sou. Ry. Co. (Tex. Civ. App.) 101 S. W. 2d. 1082.....	16
Yazoo & M. V. R. Co. v. Sideboard, 161 Miss. 4, 133 So. 669.....	8
Yazoo & M. V. R. Co. v. Webb, 64 F. 2d. 902 (5th Cir.)	14

STATUTES

Railway Labor Act of Congress of May 20, 1926, as Amended June 21, 1934, 48 Stat. at L. 1185, 45 U. S. C. A. Sections 151 et seq.....	3, 12
Mississippi Code, 1930, Section 2292.....	6
Mississippi Code, 1930, Section 2299.....	2

TREATISES

Broom's Legal Maxims (7th ed. 1874), page 705.....	14
39 Corpus Juris, page 40, Section 11.....	8
18 Ruling Case Law, page 493.....	8

BLANK PAGE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 550.

EARL MOORE,
Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

**RESPONSE OF ILLINOIS CENTRAL RAILROAD COM-
PANY TO PETITION FOR WRIT OF CERTIORARI
OF EARL MOORE AND BRIEF IN SUPPORT
THEREOF.**

STATEMENT OF THE CASE.

Petitioner, Earl Moore; a former switchman of respondent, sued respondent for damages for the alleged breach of his contract of employment. He alleged that he had been employed by respondent since June 2, 1926, was a member of the Brotherhood of Railroad Trainmen, and as such was entitled to the benefits of the agreement of November 13, 1926, between respondent and the Brotherhood of Railroad Trainmen, a labor union, designated by the contracting parties as a "schedule of Wages and Rules Governing Yardmen

and Switchtenders" (R. p. 2). He claimed that he had been discharged without just cause, in violation of Article 22, paragraph D of that agreement. See his declaration or complaint (R. pp. 1 to 3) and the agreement exhibited therewith (R. pp. 4 to 16).

Other proceedings below* are correctly stated in the petition, except in the following particular which affords the basis for respondent's contention that the judgment below is right in any event.

PROCEEDINGS ON RESPONDENT'S PLEA IN ABATEMENT
OF THE SUIT.

After the removal, respondent, with leave, withdrew all pleas filed in the state court and filed in the district court a plea in abatement (R. p. 60) seeking dismissal of the suit because petitioner had failed to pursue the remedy for the adjustment of his grievance provided in the agreement between the Brotherhood of Railroad Trainmen and the Illinois Central Railroad Company, as he was required to do

*Restated here for convenience:

The suit was instituted in a state circuit court (R. p. 1). Respondent filed a general issue plea (R. p. 22) and special pleas, among them special plea No. 6 (R. p. 39) invoking the bar of the three years' statute of limitations (Section 2299, Mississippi Code 1930). Petitioner's demurrer to the sixth special plea (R. p. 38) was sustained (R. p. 54), but the court held that other special pleas to which petitioner had demurred stated a good defense and petitioner declining to plead further dismissed petitioner's suit (R. p. 54). Petitioner appealed (R. p. 55). The State Supreme Court held the demurrer to the sixth special plea good, reversed on other grounds and remanded the case for trial on the merits. *Moore v. Illinois Central R. Co.*, 180 Miss. 276, 176 So. 595. After remand, petitioner amended his complaint so as to sue for more than \$3,000.00 (R. p. 57). Thereupon respondent removed to the United States District Court (R. p. 57) where respondent refiled special pleas (R. pp. 65-76) similar to those previously filed in the state court. One was the plea of the statute of limitations (R. p. 75). Other special pleas are not material here. Petitioner's demurrer to this special plea (R. p. 83) was sustained (R. p. 86). Thereupon respondent answered by leave of court (R. p. 87), there was a trial on the merits and judgment for petitioner (R. p. 200). Respondent appealed (R. p. 206). The Circuit Court of Appeals held that the demurrer to the sixth special plea was not good and that the issues on that plea should have been tried on the merits (R. p. 224). It reversed and remanded for such a trial (R. p. 227).

by both the agreement and the Railway Labor Act of May 20, 1926, as amended June 21, 1934, 48 Stat. at L. 1185, 45 U. S. C. A. Sec. 151, et seq. A demurrer to the plea in abatement was sustained. The Circuit Court of Appeals held that the action of the district court on the plea in abatement was correct (R. p. 225).

The undisputed evidence shows that when discharged on February 15, 1933, petitioner demanded and was given a hearing by the superintendent (R. p. 115) as provided in the collective agreement. Dissatisfied with the superintendent's decision he appealed to the general superintendent, but abandoned the appeal (see efficiency record, R. pp. 104-105).

ARGUMENT.

I.

THE CIRCUIT COURT OF APPEALS RIGHTLY HELD THAT THE PLEA OF THE THREE YEARS' STATUTE SHOULD NOT HAVE BEEN STRICKEN ON DEMURRER.

Respondent respectfully submits that the Circuit Court of Appeals rightly decided for itself whether it sufficiently appeared that the contract of employment between petitioner and respondent was wholly in writing, because the controversy is one arising under a collective bargaining agreement made pursuant to the Railway Labor Act of Congress, and therefore the question whether the collective bargaining agreement constitutes the entire contract of employment is not a matter of local law;

Wherefore, on this appeal, the Circuit Court of Appeals was free to hold that the written collective bargaining agreement, standing alone, was not petitioner's entire contract

of employment but merely became a part of his individual contract of employment, which latter may or may not have been in writing, so that the three years' statute of limitations as the state court of last resort theretofore had consistently construed it might bar the suit (*City of Hattiesburg v. Cobb Bros.*, 174 Miss. 20, 163 So. 676), notwithstanding, the state court had held that the collective bargaining agreement, wholly written, was petitioner's entire contract of employment, so that the three years' statute was not applicable (*Moore v. Illinois Central R. Co.*, 180 Miss. 276, 176 So. 593).

The Circuit Court of Appeals was free so to hold because, on the second appeal, that court by the removal had been substituted for the state court (*Wichita Royalty Co. v. City Bank*, 306 U. S. 103, 83 L. ed. 515), and the latter court would have been free on the second appeal to correct or alter its former decision in this manner (*Brewer, et al., v. Browning*, 115 Miss. 358, 76 So. 267; *Maxwell v. Harkelroad*, 77 Miss. 456, 27 So. 990).

WHETHER PETITIONER COULD SUE ON THE SCHEDULE OF WAGES
AND RULES WITHOUT PROVING HIS INDIVIDUAL CONTRACT
OF EMPLOYMENT WAS NOT A MATTER OF LOCAL LAW.

The Circuit Court of Appeals was warranted in re-examining the question and arriving at its own conclusion as to whether the three years' state statute of limitations might be applicable upon pertinent evidence, for the reasons so ably set out in the Court's opinion, i.e., that the composition of the contract of employment was not a question of local law, the subject matter of the litigation being a collective bargaining agreement, operative in many states, between

a labor union and an interstate carrier by rail, made pursuant to the Railway Labor Act of Congress. *Illinois Central R. Co. v. Moore*, 112 F. 2d. 959. The Circuit Court of Appeals said (p. 963):

"We are impressed with the seriousness of the question as to what law determines the validity and meaning of railroad union contracts, and the remedies applicable to them; and of the practical consequences of the holding that for so long a period as six years a discharged employee may sit quiet without the pursuit of the special remedies in the contract or under the Acts of Congress, and then by suit recover back pay for that time, when perhaps proof may have become difficult touching the merits of his discharge."

After reviewing the applicable provisions of the Railway Labor Act the Court further said (p. 964):

"A collective agreement between the employees of an interstate carrier by rail and their employer is therefore not a local matter as to whose nature and application the decisions of a State Supreme Court are binding on the federal courts. On the contrary, because of the subject matter, and of the federal legislation touching it, a federal court is bound to exercise an independent judgment, and the Supreme Court of the United States has final authority."

THE LABOR UNION AGREEMENT IS NOT OF ITSELF A CONTRACT OF EMPLOYMENT. PETITIONER'S INDIVIDUAL CONTRACT OF EMPLOYMENT WAS NEITHER ALLEGED NOR PROVED TO BE WHOLLY IN WRITING.

Petitioner insists that the written agreement between the labor union and respondent without more is the contract of employment between petitioner and respondent and so denominates it throughout. The state court agreed and applied the six years' statute (Section 2292, Mississippi Code 1930) accordingly. Respondent submits that an examination of the agreement (R., pp. 4-16) conclusively demonstrates that it is not a contract of employment, but is only what it is denominated, a "Schedule of Wages and Rules Governing Yardmen and Switchtenders." It is true that this Schedule is integrated into all contracts of hiring with individual switchmen, and so long as a switchman is retained in the service the terms and conditions of the Schedule govern the rates of pay, hours of service and other details of the employment. Nevertheless, in and of itself, the Schedule of wages and rules does not provide for the employment of individual switchmen or bind the labor union to furnish switchmen or the railroad company to employ switchmen, nor does it provide for the commencement of the employment of individual switchmen.

Petitioner's declaration avers that he was employed by respondent June 2, 1926, and that the collective bargaining agreement was entered into on November 13, 1926. It was not in existence then when petitioner was employed. Hence it cannot possibly constitute his entire contract of employment.

The Circuit Court of Appeals took cognizance of this situation and held that, in addition to showing the existence

of the Schedule, petitioner was required to establish his individual contract of employment and show whether it too was entirely in writing.

The only decision of the state court of last resort touching the question whether petitioner's suit is based on an oral or written contract is its decision in this case. That court said (180 Miss. 291):

"The appellant's suit is not on a verbal contract between him and the appellee, but on a written contract made with the appellee, for appellant's benefit, by the Brotherhood of Railroad Trainmen; consequently, section 2299, Code of 1930, has no application, and the time within which the appellant could sue is six years under section 2292, Code of 1930."

In holding otherwise the Circuit Court of Appeals said (112 fed. 965):

"It follows clearly that when an individual employee sues for damages for a breach of his contract of employment because of a discharge contrary to the collective agreement as Moore does; * * * he is not suing on the written collective agreement, but upon his parol contract of hiring, which adopted those terms of the collective agreement which are applicable to him. * * * It is not apparent from the petition that Moore's contract of employment is wholly provable in writing, and the plea of the three year statute should not have been stricken on demurrer."

The soundness of the view of the Circuit Court of Appeals is, we respectfully say, beyond question, for it must be conceded that in order to maintain a suit for breach of a contract of hiring the plaintiff must prove the essential elements of a contract, indicating with reasonable definite-

ness (1) the parties thereto, (2) the general character of the services to be performed, (3) the place where and the person to whom rendered, and (4) the compensation to be paid.

39 C. J., p. 40, Sec. II.

Under this principle the schedule in question is no contract of employment. It does not indicate whether petitioner here was a conductor, engineer, fireman, brakeman or engaged in some other service. It does not indicate when he was employed or where he was to work. It does not establish the relationship of employer or employé.

In other words, the schedule in question merely provides working conditions which are to be applied to any contract of employment that may be made. It is in no sense a contract of employment itself.

"Like every other contract, the relation of master and servant is a product of the meeting of minds * * * there must be some act or contract by which the parties recognize one another as master and servant."

18 R. C. L., p. 493.

Tested by this principle, it could not possibly be said that a contract between petitioner and respondent was proven by the mere production of the schedule in question.

Petitioner cites *Gulf & Ship Island R. Co. v. McGlohn*, 183 Miss. 465, 184 So. 71; *Gulf & Ship Island R. Co. v. McGlohn*, 179 Miss. 396, 174 So. 250; *Yazoo & Mississippi Valley R. Co. v. Sideboard*, 161 Miss. 4, 133 So. 669, in addition to the instant case, as supporting his contention that the state court has held that suits of this kind are suits on written contracts to which the six years' statute of limita-

tions is applicable, rather than the three years' statute. But none of those cases involved either statute of limitation or affords any support for petitioner's contention.

The decision of the Circuit Court of Appeals is not in conflict with any previous decision of the Mississippi Supreme Court, but on the contrary is supported by previous decisions. *City of Hattiesburg v. Cobb Bros. Construction Co.*, 174 Miss. 20, 163 So. 676. In that case the Court held that suits on contracts which are entirely provable by writing are governed by the six years' statute of limitations and suits on contracts which are not entirely provable by writing are governed by the three years' statute of limitations. The Court said:

"If there is any break in the chain of the writings and such break has to be supplied by parole testimony, then the three years' statute applies and not the six years."

Many Mississippi cases are therein cited to the same effect. We have found none to the contrary.

From what has been said it is apparent, respondent submits, that the Circuit Court of Appeals correctly held that the Schedule of the Wages and Rules Governing Yardmen and Switchtenders is not in itself a contract of employment and that to claim rights thereunder petitioner must allege and prove his individual contract of employment by respondent. If on another trial it appears that his individual contract of employment was wholly in writing the three years' statute would not bar the suit. On the other hand, if it was wholly or partly verbal the three years' statute would bar the suit, under the Mississippi decisions. Whatever the individual contract of employment was, the Schedule be-

came a part of it, but absent an individual contract of employment by respondent petitioner could claim no right under the Schedule.

This Court has recognized the necessity for individual contracts of employment with individual employees and separate contracts with the labor unions governing conditions of work. *Virginian Ry. Co. v. System Federation*, No. 40, 300 U. S. 515, 81 L. Ed. 789, where the Court said:

"The provisions of the Railway Labor Act applied in this case, as construed by the court below, and as we construe them, do not require petitioner to enter into any agreement with its employees, and they do not prohibit its entering into such contract of employment as it chooses, with its individual employees."

The plea of the three years' statute of limitations, therefore, should not have been stricken on demurrer but petitioner should have been required to join issue thereon so that the question of fact could have been tried in an orderly manner. The Circuit Court of Appeals so held.

THE CIRCUIT COURT OF APPEALS, AFTER REMOVAL AND ON THE SECOND APPEAL, SAT AS SUCCESSOR OF MISSISSIPPI SUPREME COURT AND WAS FREE TO RECEDE FROM THE FORMER OPINION IF SATISFIED OF ITS INCORRECTNESS.

The decision of the Mississippi Supreme Court on the first appeal was not res adjudicata. The Circuit Court of Appeals, after removal and on the second appeal, was free to re-examine the question as to which statute of limitations was applicable and to arrive at a decision different from the decision of the Mississippi Supreme Court on the first ap-

peal, if it felt that a different decision was warranted by the record.

Wichita Royalty Co. v. City Bank, 306 U. S. 103, 83 L. ed. 515.

The Mississippi Supreme Court has on more than one occasion held that it is free on a subsequent appeal to correct its former decision. *Brewer, et al., v. Browning*, 115 Miss. 358, 76 So. 267; *Maxwell v. Harkelroad*, 77 Miss. 456, 27 So. 990. This Court is likewise committed to the same doctrine. *Messenger v. Anderson*, 225 U. S. 436, 56 L. ed. 1152.

It follows that, whether the question involved was one of local law or not, under the decisions of the Mississippi Supreme Court and of this court the Circuit Court of Appeals was free to re-examine it and arrive at a decision contrary to the decision on the first appeal if it saw proper to do so.

The decisions of this court and of other Federal Courts relied on by petitioner, setting forth the duty of a Federal Court to follow the decisions of a state court in construing and applying a state statute of limitations are not in point here, we respectfully submit, for the reasons above stated.

Respondent respectfully submits that the decision of the Circuit Court of Appeals is right and proper, does not depart from previous decisions of the Supreme Court of Mississippi construing the statute, and is not in conflict with any decision of this court.

II.

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS IS CORRECT BECAUSE THE DEFENSE SET UP BY RESPONDENT'S PLEA IN ABATEMENT IS GOOD.

The plea in abatement is found at record pages 60 to 63, inclusive. Respondent submits that both the district court and the Circuit Court of Appeals were in error in sustaining petitioner's demurrer to the plea in abatement, and that for this additional reason the judgment of the Circuit Court of Appeals should not be disturbed.

Helvering v. Gowran, 302 U. S. 238, 82 L. ed. 224.

By the plea in abatement respondent invokes the provisions of the Railway Labor Act of Congress, Section 153, Title 45, U. S. Code Annotated. That Act (Section 151a) is a studied recognition of the desirability of preserving harmonious relations between interstate railroads and their employees and is one of the early acts of Congress providing the machinery for collective bargaining between employers and employees. The Act provides for the selection of collective bargaining representatives by the employees and requires the railroads to deal with such representatives (Section 152) and provides the method for the settling of grievances, disputes and disagreements between an employee or group of employees and the railroad touching rates of pay, working conditions and contracts of employment (Section 152). The Act is mandatory as to the duty of railroad companies to make agreements with their employees through their bargaining representatives, and as to grievances thereunder the Act in Section 153 (i) provides:

"The disputes between an employee or group of employees and a carrier or carriers growing out of griev-

ances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

By Section 153 (m) the Adjustment Board is authorized to hear the dispute and to make such award as it deems proper under the facts of the case. The Act in Section 153 (q) contains its own statute of limitations, i.e., two years after the Adjustment Board's award.

In the instant case petitioner claims the benefits of the collective bargaining agreement between the Brotherhood of Railroad Trainmen and the Illinois Central Railroad Company. He specifically relies on Article 22 (D) of the agreement (R. p. 15), which is as follows:

"Yardmen or switchtenders taken out of the service or censured for cause, shall be notified by the Company of the reason therefor, and shall be given a hearing within five days after being taken out of service, if demanded, and if held longer shall be paid for all time so held at their regular rates of pay. Yardmen or switchtenders shall have the right to be present and to have an employe of their choice at hearings and investigations to hear the testimony, and ask questions which will bring out facts pertinent to the case. They shall also have the right to bring such witnesses as they desire to give testimony, and may appeal to higher officers of the Company in case the decision is unsatisfactory. Such decision shall be made known within three

days at New Orleans and at other points ten days after the hearing, or yardmen or switchtenders shall be paid for all time lost after the expiration of three days at New Orleans and ten days at other points. In case the suspension or dismissal or censure is found to be unjust, yardmen or switchtenders shall be reinstated and paid for all time lost."

His whole case is pitched on the last sentence of that article. That sentence provides the right, the remedy and the redress. Petitioner claims as a third party beneficiary. As such, he must take the agreement as he finds it. If he elects to take the benefits of the agreement he must take its burdens also. "*Qui sentit commodum sentire debet et onus.*" *Broom's Legal Maxims* (7th ed., 1874), p. 705; *Yazoo & M. V. R. Co. v. Webb*, 64 F. 2d. 902. Phrased differently: "One may not select the desirable morsels served by his contract and toss the less choice parts beneath the table." *Northern State Contracting Co. v. Swope*, 271 Ky. 140, 111 S. W. 2d. 610. The hearings and appeals provided in the article quoted are obviously what the Congress had in mind when it required by Section 153 (i) that "the disputes * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes," etc.

This record shows that petitioner was familiar with Article 22 (D) of the agreement. The right of action he asserts depends on it. In fact, he set in motion the machinery provided in Article 22 (D) for determining the justness or unjustness of his discharge, but he failed and refused to prosecute the appeal he took from the superintendent's decision, abandoned the appeal and took his case to court.

In this situation it was and is the contention of the respondent that under both the Railway Labor Act and the agreement made pursuant thereto it was petitioner's duty to exhaust the remedies provided by the agreement before resorting to the courts. Indeed, it logically follows that his only redress is that provided in the agreement, i.e., reinstatement and payment for all time lost. Respondent goes further. It contends that the word "may" in the paragraph of the Act quoted above, is mandatory, and that before petitioner can resort to the courts he must have a favorable award from the National Railroad Adjustment Board. The Circuit Court of Appeals and the district court held that the foregoing statutory and contractual provisions are permissive only and that petitioner was not required to exhaust the contractual remedy, but could resort to the courts without seeking the relief provided in the agreement. This holding is contrary to the decision of the Circuit Court of Appeals for the Eighth Circuit in *Harrison v. Pullman Co.*, 68 F. 2d. 826. That Court said in passing upon the right of an employee to seek redress in the courts for breach of such a contract of hiring:

"It is evident that this contract between the Pullman Company and its employees was entered into for the purpose of establishing a complete and explicit code for the adjustment of labor disputes involving, among other things, such questions of employment. Appellant in terms sues because of an alleged breach of this contract, and, to prevail, he must show that he has brought himself within its terms and has been unable to secure a satisfactory adjustment by the means therein expressly provided. This he has failed to do, and for this reason he is unable to present his case in court as a justiciable controversy."

See also:

Estes, et al., v. Union Terminal Co., 89 F. 2d. 768;
St. Louis, B. & M. Ry. Co. v. Booker (Tex. Civ. App.),
 5 S. W. 2d. 856;

Cousins v. Pullman Co. (Tex. Civ. App.), 72 S. W. 2d.
 356;

Norfolk & W. Ry. Co. v. Harris, 260 Ky. 132, 84 S. W.
 2d. 69;

Reed v. St. Louis S. W. R. Co. (Mo. App.), 95 S. W.
 2d. 887;

Swilley v. Galveston, H. & S. A. Ry. Co. (Tex. Civ.
 App.), 96 S. W. 2d. 105;

Wyatt v. Kansas City Sou. Ry. Co. (Tex. Civ. App.),
 101 S. W. 2d. 1082;

Caulfield v. Yazoo & M. V. R. Co., 170 La. 155, 127
 So. 585;

Bell v. Western Ry., 228 Ala. 328, 153 So. 434;

Adams v. Southern P. Co., 204 Cal. 63, 266 Pac. 541,
 57 A. L. R. 1066.

The Circuit Court of Appeals in the instant case recognized the fact that the Railway Labor Act has for one of its purposes the prompt and orderly settlement of all disputes growing out of the interpretation and application of agreements covering rates of pay, rules and working conditions; that by Title 45, U. S. C. A., Section 152, railroads and their employees are required to exert every effort to make and maintain collective bargaining agreements, and that all disputes between a carrier and its employees are required to be considered and decided with expedition in conferences between representatives designated and authorized to confer. Notwithstanding the requirement that both the railroad and the employee must submit grievances through the channels provided by the Act and the agreement, the Circuit Court of Appeals held that the employee

is at liberty to ignore the provisions of the Act and the terms of the agreement and resort to the courts in the first instance. ✓

We submit that this holding in effect thwarts the legislative purpose to prevent any interruption of interstate commerce and to provide for the orderly settlement of disputes between railroads and their employees in the manner provided in collective bargaining agreements. If the individual employee may ignore the terms of the Act and of the collective bargaining agreement and go direct to the courts without exhausting the remedy and seeking the redress provided thereby, the Act, insofar as employees are concerned, is unenforceable and impotent to prevent the very threats to commerce that Congress sought to avoid. L

Furthermore, if the adjustment of grievances may be left in the hands of juries in the several courts of the numerous states through which respondent operates there can be no repose under the collective bargaining agreement and the resulting inequalities of administration may well lead to the very disturbances the Railway Labor Act was designed to prevent.

Respondent therefore submits that the judgment of the Circuit Court of Appeals finds ample support in this further ground, and hence is correct in any event and should not be disturbed.

Respondent respectfully submits that this record does not present a case which calls for the exercise by this Court of its supervisory powers or for the granting of the writ of certiorari prayed for.

Respectfully submitted,

JAMES L. BYRD,
Jackson, Mississippi,
CLINTON H. McKAY,
Memphis, Tennessee,
Attorneys for Respondent.

E. C. CRAIG and
V. W. FOSTER, of Chicago, Illinois,
LUCIUS E. BURCH, JR., of Memphis, Tennessee,
Of Counsel.

APPENDIX A.**Mississippi Code, 1930.****Section 2292. Actions To Be Brought in Six Years.**

All actions for which the other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

Section 2299. Actions To Be Brought in Three Years.

Actions on an open account or stated account not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three years next after the cause of such action accrued and not after.

APPENDIX B.

Railway Labor Act of Congress of May 20, 1926, as Amended June 21, 1934, 48 Stat. at L. 1185, 45 U. S. C. A. Section 151, et Seq.

Section 151. Definitions; "Railway Labor Act"

When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to chapter 1 of Title 49, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter. ¶

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the district court of the United States for the District of Columbia; and the term "circuit court of appeals" includes the United States Court of Appeals for the District of Columbia.

This chapter may be cited as the "Railway Labor Act." (May 20, 1926, c. 347, Sec. 1, 44 Stat. 577; June 7, 1934, c. 426, 48 Stat. 926; June 21, 1934, c. 691, Sec. 1, 48 Stat. 1185; June 25, 1936, c. 804, 49 Stat. 1921.)

Section 151a. General Purposes.

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. (May 20, 1926, c. 347, Sec. 2, 44 Stat. 577, as amended June 21, 1934, c. 691, Sec. 2, 48 Stat. 1186.)

Section 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and

working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Désignation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing.

The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules or working conditions contrary to agreement or to section 156 forbidden

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this chapter.

Eighth. Notices of manner of settlement of disputes; posting

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between

the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish

the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations; prosecution and penalties

The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than \$1,000 nor more than \$20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor

by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent. (May 20, 1926, c. 347, Sec. 2, 44 Stat. 577, as amended June 21, 1934, c. 691, Sec. 2, 48 Stat. 1186.)

Section 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards

There is hereby established a Board, to be known as the "National Railroad Adjustment Board," the members of which shall be selected within thirty days after June 21, 1934, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this chapter.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after re-

ceipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, con-

ductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee," to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select

a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(r) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly,

and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(s) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(t) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(u) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice-chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(v) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (1) hereof, with respect to a division of the Adjustment Board.

Second. Establishment of system, group or regional boards by voluntary agreement.

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board. (May 20, 1926, c. 347, Sec. 3, 44 Stat. 578, as amended June 21, 1934, c. 691, Sec. 3, 48 Stat. 1189.)

Section 154 National Mediation Board

(Omitted)

Section 155. Functions of Mediation Board

(Omitted)

Section 156. Procedure in changing rates of pay, rules and working conditions

(Omitted)

Section 157. Arbitration

(Omitted)

Section 158. Agreement to arbitrate; form and contents; signatures and acknowledgment; revocation

(Omitted)

Section 159. Award and judgment thereon; effect of chapter on individual employee

Omitted down to paragraph Eighth, which is as follows:

Eighth. Duty of employee to render service without consent; right to quit. Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent. (May 20, 1926, c. 347, Sec. 9, 44 Stat. 585.)

Section 160. Emergency Board

(Omitted)

Section 161. Effect of partial invalidity of chapter

(Omitted)

Section 162. Appropriation

(Omitted)

Section 163. Repeal of prior legislation; exception

(Omitted)

Section 164. Advertisements for proposals for purchases or services rendered for Board of Mediation, including arbitration boards.

(Omitted)

BLANK PAGE

BLANK PAGE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 550.

EARL MOORE,
Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

**BRIEF OF ILLINOIS CENTRAL RAILROAD
COMPANY.**

JAMES L. BYRD,
Jackson, Mississippi,
CLINTON H. McKAY,
Memphis, Tennessee,
Attorneys for Respondent.

E. C. CRAIG and
V. W. FOSTER, of Chicago, Illinois,
LUCIUS E. BURCH, JR., of Memphis, Tennessee,
Of Counsel.

BLANK PAGE

TABLE OF CONTENTS

	Pages
Statement of the Case.....	1
Points	3
Proceedings on respondent's plea of three years' statute of limitations.....	5
Proceedings on respondent's plea in abatement of the suit	6
Argument	7-23
I. Three years' statute of limitations was applicable	7-16
The collective bargaining agreement is not of itself a contract of employment. Petitioner's individual contract of employment was neither alleged nor proved to have been wholly in writing	7
Whether petitioner could sue on the collective bargaining agreement without proving his individual contract of employment was not a matter of local law.....	12
Circuit Court of Appeals rightly held that the plea of the three years' statute of limitations should not have been stricken on demurrer....	15
II. Petitioner's suit premature because he has not exhausted administrative remedies.....	17-22
The judgment of the Circuit Court of Appeals is correct in any event because defense set up by respondent's plea in abatement is good.....	17
Conclusion	23

TABLE OF CASES

Adams v. Southern P. Co., 204 Cal. 63, 266 Pac. 541, 57 A. L. R. 1066.....	21
Bell v. Western Ry., 228 Ala. 328, 153 So. 434.....	21
Brewer, et al., v. Browning, 115 Miss. 358, 76 So. 267..	16
Caulfield v. Yazoo & M. V. R. Co., 170 La. 155, 127 So. 585	21
City of Hattiesburg v. Cobb Bros., 174 Miss. 20, 163 So. 676	10, 15
Cousins v. Pullman Co., (Tex. Civ. App.) 72 S. W. 2d. 356	21
Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188.	13
Estes, et al., v. Union Terminal Co., 89 F. 2d. 768 (5th Cir.)	20
Gulf & Ship Island R. Co. v. McGlohn, 179 Miss. 396, 174 So. 250.....	9
Gulf & Ship Island R. Co. v. McGlohn, 183 Miss. 465, 184 So. 71.....	9
Harrison v. Pullman Co., 68 F. 2d. 826 (8th Cir.)....	20
Helvering v. Gowran, 302 U. S. 238, 82 L. ed. 224....	17
Illinois Central R. Co. v. Moore, 112 F. 2d. 959 (5th Cir.)	8, 13
Langnes v. Green, 282 U. S. 531, 75 L. ed. 520.....	4
Maxwell v. Harkelroad, 77 Miss. 456, 27 So. 990.....	16
Messenger v. Anderson, 225 U. S. 436, 56 L. ed. 1152..	16
Moore v. I. C. R. Co., 180 Miss. 276, 176 So. 593....	5, 8, 15
Norfolk & W. Ry. Co. v. Harris, 260 Ky. 132, 84 S. W. 2d. 69	21
Northern State Contracting Co. v. Swope, 271 Ky. 140, 111 S. W. 2d. 610.....	19
Rawlings, Receiver, v. Ray, No. 327, U. S. Sup. Ct., decided February 3, 1941.....	13

TABLE OF CASES—Cont'd

Reed v. St. Louis S. W. R. Co. (Mo. App.) 95 S. W. 2d. 887	21
Robertson & Kirkham, Jurisdiction of Supreme Court, p. 804	4
Story Parchment Co. v. Patterson Parchment Paper Co., 282 U. S. 555, 75 L. ed. 544	4
St. Louis, B. & M. Ry. Co. v. Booker (Tex. Civ. App.) 5 S. W. 2d. 856	20
Swilley v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 96 S. W. 2d. 105	21
Virginia Ry. Co. v. System Federation, No. 40, 300 U. S. 515, 81 L. ed. 789	11
Wichita Royalty Co. v. City Bank, 306 U. S. 103, 83 L. ed. 515	16
Wyatt v. Kansas City Sou. Ry. Co. (Tex. Civ. App.) 101 S. W. 2d. 1082	21
Yazoo & M. V. R. Co. v. Sideboard, 161 Miss. 4, 133 So. 669	9
Yazoo & M. V. R. Co. v. Webb, 64 F. 2d. 902 (5th Cir.)	19

STATUTES

Railway Labor Act of Congress of May 20, 1926, as Amended June 21, 1934, 48 Stat. at L. 1185, 45 U. S. C. A. Sections 151 et seq.	2, 17, 26
Mississippi Code, 1930, Section 2292	7, 25
Mississippi Code, 1930, Section 2299	3, 25

TREATISES

Broom's Legal Maxims (7th ed. 1874), page 705	19
39 Corpus Juris, page 40, Section 11	9
18 Ruling Case Law, page 493	9

BLANK PAGE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 550.

EARL MOORE,
Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY;
Respondent.

**BRIEF OF ILLINOIS CENTRAL RAILROAD
COMPANY.**

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

Petitioner, Earl Moore, filed this suit in the Circuit Court of the First Judicial District of Hinds County, Mississippi, on September 15, 1936 (R. p. 19). He alleged that he had been employed by respondent as a switchman in its Jackson, Mississippi, yards on June 2, 1926 (R. p. 2); that he was a member of the Brotherhood of Railroad Trainmen, a labor union, which had a contract with respondent providing for rules and rates of pay of trainmen employed by respondent, and that he was entitled to the benefits of said labor union contract (R. p. 2), this contract being made Exhibit A to the declaration (R. pp. 4-16);

that said contract provided that "no person should be fired or discharged without just cause" (R. p. 3); that on or about February 15, 1933, he was discharged without just cause (R. p. 3). He sought damages.

The so-called contract between the Brotherhood of Railroad Trainmen and respondent, denominated by the contracting parties as a "Schedule of Wages and Rules Governing Yardmen and Switchtenders," is dated April 1, 1924, and is a collective bargaining agreement between the labor union and respondent, made pursuant to the Railway Labor Act of May 20, 1926, as amended June 21, 1934, 48 Stat. at L. 1185, 45 U.S.C.A., Sec. 151, et seq. With respect to the discharge of yardmen or switchtenders said collective bargaining agreement contains the following provision in Article 22 entitled "Investigations," paragraph (D):

"(D) Yardmen or switchtenders taken out of the service or censured for cause, shall be notified by the Company of the reason therefor, and shall be given a hearing within five days after being taken out of service, if demanded, and if held longer shall be paid for all time so held at their regular rates of pay. Yardmen switchtenders shall have the right to be present and to have an employe of their choice at hearings and investigations to hear the testimony, and ask questions which will bring out facts pertinent to the case. They shall also have the right to bring such witnesses as they desire to give testimony, and may appeal to higher officers of the Company in case the decision is unsatisfactory. Such decision shall be made known within three days at New Orleans and at other points ten days after the hearing, or yardmen or switchtenders shall be paid for all time lost after the expiration of three days at New Orleans and ten days at other points. In case the suspension or dismissal or censure is found to be unjust, yardmen or switchtenders shall be reinstated and paid for all time lost."

On February 15, 1933, petitioner was discharged by respondent. He requested a hearing on February 17, 1933; the hearing was held at Jackson, Mississippi, on February 20, 1933, and a decision unsatisfactory to him was rendered by the Superintendent before whom the hearing took place. He appealed to the General Superintendent, but did not pursue his appeal. (See Efficiency Record, R. pp. 104-105.)

POINTS.

Two questions are urged by respondent on this appeal:

1. Respondent contends that petitioner's action is governed by the state statute of limitations of three years (Mississippi Code 1930, Section 2299, Appendix A, p. 25).

This statute applies to "actions * * * on any unwritten contract, express or implied." The highest court of the state has held that this statute is applicable to any contract which must be proved in part by parol testimony. (Post, p. 10.)

The Circuit Court of Appeals on this record determined for itself, as a federal question, that petitioner's contract of employment was made up of his individual contract of employment into which the collective bargaining agreement is integrated by operation of law. The record shows the collective bargaining agreement is in writing. Petitioner neither alleged nor proved that his individual contract of employment was in writing. The Circuit Court of Appeals concluded that the three years' statute of limitations might be applicable if the individual contract of employment was not in writing and reversed and remanded the case for a trial of that issue.

Respondent insists that the Circuit Court of Appeals was free to determine for itself, from the record before

it, whether the employment contract on which petitioner sued was wholly in writing or partly in writing and partly in parol. Since the employment relationship between petitioner and respondent is governed by the Railway Labor Act of Congress, the make-up of the employment contract is a federal question. After ascertaining that the employment contract is partly in parol, there can be no difficulty in applying the applicable state statute of limitations as interpreted by the highest court of the state.

2. Respondent contends, in the alternative, that in any event the judgment of the Circuit Court of Appeals should be affirmed because petitioner is required by the Railway Labor Act of Congress to exhaust the remedy for the adjustment of his grievance provided in the collective bargaining agreement and in the Act itself, as a prerequisite to his right to resort to the courts, which petitioner failed to do; that his suit therefore is premature and should be dismissed.

This point was decided adversely to respondent by the Circuit Court of Appeals. It is urged here by respondent as a reason why the judgment below should be affirmed, although decided adversely to respondent below, which respondent understands to be proper practice under the authority of such cases as *Langnes v. Green*, 282 U. S. 531, 75 L. ed. 520; *Story Parchment Co. v. Patterson Parchment Paper Co.*, et al., 282 U. S. 555, 75 L. ed. 544; and *Robertson and Kirkham, Jurisdiction of Supreme Court*, p. 804.

The manner in which the foregoing contentions of respondent were raised and disposed of below is stated in some detail under the two headings immediately following.

PROCEEDINGS ON RESPONDENT'S PLEA OF THREE YEARS' STATUTE
OF LIMITATIONS.

The suit was instituted in a state circuit court (R. p. 1) on September 15, 1936 (R. p. 19). Petitioner was discharged on February 15, 1933 (R. p. 104). Respondent filed a general issue plea (R. p. 22) and special pleas, among them special plea No. 6 (R. p. 39) invoking the bar of the three years' statute of limitations (Section 2299, Mississippi Code 1930). Petitioner's demurrer to the sixth special plea (R. p. 38) was sustained (R. p. 54), but the court held that other special pleas to which petitioner had demurred stated a good defense and, petitioner declining to plead further, dismissed petitioner's suit (R. p. 54). Petitioner appealed (R. p. 55). The State Supreme Court held the demurrer to the sixth special plea good, reversed on other grounds and remanded the case for trial on the merits. *Moore v. Illinois Central R. Co.*, 180 Miss., 276, 176 So. 595. After remand, petitioner amended his complaint so as to sue for more than \$3,000.00 (R. p. 57). Thereupon respondent removed to the United States District Court (R. p. 57) where respondent, as hereinafter mentioned, withdrew all pleas filed in the state court and filed a plea in abatement (R. p. 60) which was overruled, and then refiled special pleas (R. pp. 65-76) similar to those previously filed in the state court. One was the plea of the three years' statute of limitations (R. p. 75). Petitioner's demurrer to this special plea (R. p. 83) was sustained (R. p. 86). Thereupon respondent answered by leave of court (R. p. 87), there was a trial on the merits and judgment for petitioner (R. p. 200). Respondent appealed (R. p. 206). The Circuit Court of Appeals held that the demurrer to the sixth special plea should not have been sustained because petitioner's contract of employment by

respondent consists of the collective bargaining agreement integrated into his individual contract of employment, both together constituting the contract on which he sues, and that there was neither allegation nor proof that petitioner's individual contract of employment was in writing; and that the issues on that plea should have been tried on the merits (R. p. 224). It reversed and remanded for such a trial (R. p. 227).

PROCEEDINGS ON RESPONDENT'S PLEA IN ABATEMENT OF THE
SUIT.

After the removal, respondent, with leave, withdrew all pleas filed in the state court and filed in the district court a plea in abatement (R. p. 60) seeking dismissal of the suit because petitioner had failed to pursue the remedy for the adjustment of his grievance provided in the collective bargaining agreement between the Brotherhood of Railroad Trainmen and the Illinois Central Railroad Company, as he was required to do by both the agreement and the Railway Labor Act of May 20, 1926, as amended June 21, 1934, 48 Stat. at L. 1185, 45 U. S. C. A. Sec. 151, et seq. A demurrer to the plea in abatement was sustained. The Circuit Court of Appeals held that the action of the district court on the plea in abatement was correct. (R. p. 225.)

The undisputed evidence shows that when discharged on February 15, 1933, petitioner demanded and was given a hearing by the superintendent (R. p. 115) as provided in the collective bargaining agreement. Dissatisfied with the superintendent's decision he appealed to the general superintendent, but abandoned the appeal (see efficiency record, R. pp 104-105).

ARGUMENT.

I.

Three Years' Statute of Limitations Was Applicable.

THE COLLECTIVE BARGAINING AGREEMENT IS NOT OF ITSELF A CONTRACT OF EMPLOYMENT. PETITIONER'S INDIVIDUAL CONTRACT OF EMPLOYMENT WAS NEITHER ALLEGED NOR PROVED TO HAVE BEEN WHOLLY IN WRITING.

Petitioner insists that the written agreement between the labor union and respondent without more is the contract of employment between petitioner and respondent and so denominates it throughout. The state court agreed and applied the six years' statute (Section 2292, Mississippi Code 1930) accordingly. Respondent submits that an examination of the agreement (R. pp. 4-16) conclusively demonstrates that it is not a contract of employment, but is only what it is denominated, a "Schedule of Wages and Rules Governing Yardmen and Switchtenders." It is true that this schedule is integrated into all contracts of hiring with individual switchmen, and so long as a switchman is retained in the service the terms and conditions of the schedule govern the rates of pay, hours of service and other details of the employment. Nevertheless, in and of itself, the schedule of wages and rules does not provide for the employment of individual switchman or bind the labor union to furnish switchmen or the railroad company to employ switchmen, nor does it provide for the commencement of the employment of individual switchmen.

Petitioner's declaration avers that he was employed by respondent June 2, 1926. The collective bargaining agreement was entered into on April 1, 1924 (R. p. 4). It was in existence then when petitioner was employed. Hence it became an integral part of his contract of employment by operation of law.

The Circuit Court of Appeals took cognizance of this situation and held that, in addition to showing the existence of the schedule, petitioner was required to establish his individual contract of employment and show whether it too was entirely in writing.

The only decision of the state court of last resort touching the question whether petitioner's suit is based on an oral or written contract is its decision in this case. That court said (180 Miss. 291):

"The appellant's suit is not on a verbal contract between him and the appellee, but on a written contract made with the appellee, for appellant's benefit, by the Brotherhood of Railroad Trainmen; consequently, section 2299, Code of 1930, has no application, and the time within which the appellant could sue is six years under section 2292, Code of 1930."

In holding otherwise the Circuit Court of Appeals said (112 Fed. 965):

"It follows clearly that when an individual employee sues for damages for a breach of his contract of employment because of a discharge contrary to the collective agreement as Moore does; * * * he is not suing on the written collective agreement, but upon his parol contract of hiring, which adopted those terms of the collective agreement which are applicable to him. * * * It is not apparent from the petition that Moore's contract of employment is wholly provable in writing, and the plea of the three year statute should not have been stricken on demurrer."

The soundness of the view of the Circuit Court of Appeals is, we respectfully say, beyond question, for it must be conceded that in order to maintain a suit for breach of a contract of hiring the plaintiff must prove the essential elements of a contract, indicating with reasonable definite-

ness (1) the parties thereto, (2) the general character of the services to be performed, (3) the place where and the person to whom services are to be rendered, and (4) the compensation to be paid.

39 C. J., p. 40, Sec. II.

Under this principle the schedule in question is no contract of employment. It does not indicate whether petitioner here was a conductor, engineer, fireman, brakeman, switchman, switchtender, or engaged in some other service. It does not indicate when he was employed or where he was to work. It does not establish the relationship of employer or employee between petitioner and respondent.

In other words, the schedule in question merely provides working conditions which are to be applied to any contract of employment that may be made. It is in no sense a contract of employment itself.

"Like every other contract, the relation of master and servant is a product of the meeting of minds * * * there must be some act or contract by which the parties recognize one another as master and servant."

18 R. C. L., p. 493.

Tested by this principle, it could not possibly be said that a contract of employment between petitioner and respondent was proven by the mere production of the schedule in question.

Petitioner cites *Gulf & Ship Island R. Co. v. McGlohn*, 183 Miss. 465, 184 So. 71; *Gulf & Ship Island R. Co. v. McGlohn*, 179 Miss. 396, 174 So. 250; *Yazoo & Mississippi Valley R. Co. v. Sideboard*, 161 Miss. 4, 133 So. 669, in addition to the instant case, as supporting his contention that the

state court has held that suits of this kind are suits on written contracts to which the six years' statute of limitations is applicable, rather than the three years' statute. But none of those cases involved either statute of limitation or affords any support for petitioner's contention. An examination of each of those cases shows that the question of the applicability of any particular statute of limitations was not involved and was not passed upon by the court. In the Sideboard case, *supra*, there was involved the question as to whether under a labor union contract, somewhat similar to the contract in question in the instant case, a person performing the duties of a flagman was entitled to the wages of a flagman, whether a member of the union or not. Neither the plaintiff nor the railroad company in that case raised any question about the nature of the contract or the question of limitation of action.

In the two McGlohn cases, *supra*, the Supreme Court of Mississippi had under consideration the construction of an entirely different contract with a different labor organization, and containing different provisions with respect to trials, discharges, etc., but in neither of these cases was the question of the applicability of any particular statute of limitations involved, and neither the court nor the parties, so far as the record in these cases show, adverted to the question of which statute applied. We submit that neither of these cases is authority for the contentions of the petitioner.

The decision of the Circuit Court of Appeals is not in conflict with any previous decision of the Mississippi Supreme Court, but on the contrary is supported by previous decisions. *City of Hattiesburg v. Cobb Bros. Construction Co.*, 174 Miss. 20, 163 So. 676. In that case the

Court held that suits on contracts which are entirely provable by writing are governed by the six years' statute of limitations and suits on contracts which are not entirely provable by writing are governed by the three years' statute of limitations. The Court said:

"If there is any break in the chain of the writings and such break has to be supplied by parol testimony, then the three years' statute applies and not the six years."

Many Mississippi cases are therein cited to the same effect. We have found none to the contrary.

From what has been said it is apparent, respondent submits, that the Circuit Court of Appeals correctly held that the Schedule of the Wages and Rules Governing Yardmen and Switchtenders is not in itself a contract of employment and that to claim rights thereunder petitioner must allege and prove his individual contract of employment by respondent. If on another trial it appears that his individual contract of employment was wholly in writing the three years' statute would not bar the suit. On the other hand, if it was wholly or partly verbal the three years' statute would bar the suit, under the Mississippi decisions. Whatever the individual contract of employment was, the schedule became a part of it, but absent an individual contract of employment petitioner could claim no rights under the schedule.

This court has recognized the necessity for individual contracts of employment with individual employees and separate contracts with the labor unions governing conditions of work. *Virginia Ry. Co. v. System Federation*, No. 40, 300 U. S. 515, 81 L. Ed. 789, where the court said:

"The provisions of the Railway Labor Act applied in this case, as construed by the court below, and as

we construe them, do not require petitioner to enter into any agreement with its employees, and they do not prohibit its entering into such contract of employment as it chooses, with its individual employees."

The plea of the three years' statute of limitation, therefore, should not have been stricken on demurrer but petitioner should have been required to join issue thereon so that the question of fact as to whether the individual contract of employment was wholly in writing could have been tried in an orderly manner. The Circuit Court of Appeals so held.

WHETHER PETITIONER COULD SUE ON THE COLLECTIVE BARGAINING AGREEMENT WITHOUT PROVING HIS INDIVIDUAL CONTRACT OF EMPLOYMENT WAS NOT A MATTER OF LOCAL LAW.

The Railway Labor Act of Congress governs the employment relationship, embracing both petitioner's individual contract of employment and the collective bargaining agreement which became a part of it. Whether his right to sue for his alleged wrongful discharge rests on both his individual contract of employment and the collective bargaining agreement, or on the latter alone, is a question arising under the Railway Labor Act of Congress and therefore a federal question. The Circuit Court of Appeals held that petitioner's right to sue depended on his entire contract of employment embracing both his individual contract of employment and the collective bargaining agreement. That was a federal question which the Circuit Court of Appeals was free to decide for itself. Having so decided that federal question, the Circuit Court of Appeals applied the State Statute of Limitations as interpreted by the State Court, to that situation.

The Circuit Court of Appeals did not encroach upon the domain of state law. It applied the state statute as interpreted by the state court to an employment contract depending for its characteristics on the Railway Labor Act of Congress. Obviously, the doctrine of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188 was not disregarded by the Circuit Court of Appeals.

The action of the Circuit Court of Appeal is strictly in accord with the recent decision of this court in *A. F. Rawlings, Receiver, v. Mrs. Ella M. Ray*, No. 327, decided February 3, 1941, wherein the Arkansas statute of limitations as interpreted by the state court was applied, but the time when the "cause of action accrued" under applicable federal legislation was held to be a federal question which this court decided for itself.

Hence, the Circuit Court of Appeals was warranted in re-examining the question and arriving at its own conclusion as to whether the three years' state statute of limitations might be applicable to the case made by the declaration upon pertinent evidence, for the reasons so ably set out in the Court's opinion, i.e., that the make-up of petitioner's contract of employment was not a question of local law, the subject matter of the litigation being his rights under a collective bargaining agreement, operative in many states, between a labor union and an interstate carrier by rail, made pursuant to the Railway Labor Act of Congress. *Illinois Central R. Co. v. Moore*, 112 F. 2d 959. The Circuit Court of Appeals said (p. 963):

"We are impressed with the seriousness of the question as to what law determines the validity and meaning of railroad union contracts, and the remedies applicable to them; and of the practical consequences of

the holding that for so long a period as six years a discharged employee may sit quiet without the pursuit of the special remedies in the contract or under the Acts of Congress, and then by suit recover back pay for that time, when perhaps proof may have become difficult touching the merits of his discharge."

After reviewing the applicable provisions of the Railway Labor Act the Court further said (p. 964):

"A collective agreement between the employees of an interstate carrier by rail and their employer is therefore not a local matter as to whose nature and application the decisions of a State Supreme Court are binding on the federal courts. On the contrary, because of the subject matter, and of the federal legislation touching it, a federal court is bound to exercise an independent judgment, and the Supreme Court of the United States has final authority."

The Circuit Court of Appeals in announcing its conclusion said:

"His contract of employment standing thus, and no federal statute providing any limitation, we think the pleaded State statute of three years may apply: 'Actions on an open account or stated account not acknowledged in writing, and signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three years next after the cause of such action accrued, and not after.' Mississippi Code, Sec. 2299. It is well settled that a contract is unwritten if the contract itself cannot be proven wholly by writings. 37 C. J., Limitations, Sec. 86. 'If there is any break in the chain of the writings and such break has to be supplied by parol testimony, then the three years' statute applies and not the six years.' * * * Any break in the writing or writings which is material and provable only by parol brings the three years' statute into

operation.' *City of Hattiesburg v. Cobb Bros. Const. Co.*, 174 Miss. 20, 163 So. 676, 678. It is not apparent from the petition that Moore's contract of employment is wholly provable in writing, and the plea of the three year statute should not have been stricken on demurrer."

CIRCUIT COURT OF APPEALS RIGHTLY HELD THAT THE PLEA OF THE THREE YEARS' STATUTE SHOULD NOT HAVE BEEN STRICKEN ON DEMURRER.

Respondent respectfully submits that the Circuit Court of Appeals, on this record, rightly decided for itself that the employment relationship which existed between petitioner and respondent rested on petitioner's individual contract of employment by respondent of which the collective bargaining agreement became a part by reason of the provisions of the Railway Labor Act of Congress; that petitioner could not sue directly on the collective bargaining agreement alone, and that petitioner had failed to allege and prove that his individual contract of employment was entirely in writing.

Wherefore, on this appeal, the Circuit Court of Appeals was free to hold that the three years' statute of limitations as the state court of last resort consistently construed it (*City of Hattiesburg v. Cobb Bros.*, 174 Miss. 20, 163 So. 676) might bar the suit notwithstanding the state court had held that the collective bargaining agreement, wholly written, was petitioner's entire contract of employment and that the three years' statute was not applicable (*Moore v. Illinois-Central R. Co.*, 180 Miss. 276, 176 So. 593).

The Circuit Court of Appeals was free to do so further because, on the second appeal, that court by the removal

had been substituted for the state court (*Wichita Royalty Co. v. City Bank*, 306 U. S. 103, 83 L. ed. 515), and the latter court would have been free on the second appeal to correct or alter its former decision in this manner (*Brewer, et al., v. Browning*, 115 Miss. 358, 76 So. 267; *Maxwell v. Harkelroad*, 77 Miss. 456, 27 So. 990). This court is likewise committed to the same doctrine. *Messenger v. Anderson*, 225 U. S. 436, 56 L. ed. 1152.

It follows that, whether the question involved was one of local law or not, under the decisions of the Mississippi Supreme Court and of this court the Circuit Court of Appeals was free to re-examine it on the second appeal and arrive at a decision contrary to the decision on the first appeal if it saw proper to do so.

The decisions of this court and of other Federal Courts relied on by petitioner, setting forth the duty of a Federal Court to follow the decisions of a state court in construing and applying a state statute of limitations are not in point here, we respectfully submit, for all the reasons above stated.

—o—

Respondent respectfully submits that the decision of the Circuit Court of Appeals is right and proper, does not depart from previous decisions of the Supreme Court of Mississippi construing the statute, and is not in conflict with any decision of this court.

II.

Petitioner's Suit Premature Because He Has Not Exhausted Administrative Remedies.

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS IS CORRECT BECAUSE THE DEFENSE SET UP BY RESPONDENT'S PLEA IN ABATEMENT IS GOOD.

The plea in abatement is found at record pages 60 to 63, inclusive. Respondent submits that both the district court and the Circuit Court of Appeals were in error in sustaining petitioner's demurrer to the plea in abatement, and that for this additional reason the judgment of the Circuit Court of Appeals should not be disturbed.

Helvering v. Gowran, 302 U. S. 238, 82 L. ed. 224.

By the plea in abatement respondent invokes the provisions of the Railway Labor Act of Congress, Section 153, Title 45, U. S. Code Annotated. That Act (Section 151a) is a studied recognition of the desirability of preserving harmonious relations between interstate railroads and their employees and is one of the early acts of Congress providing the machinery for collective bargaining between employers and employees. The Act provides for the selection of collective bargaining representatives by the employees and requires the railroads to deal with such representatives (Section 152) and provides the method for the settling of grievances, disputes and disagreements between an individual employee or group of employees and the railroad touching rates of pay, working conditions and contracts of employment (Section 152). The Act is mandatory as to the duty of railroad companies to make agreements with their employees through their bargaining representatives, and as to grievances thereunder the Act in Section 153 (i) provides:

"The disputes between employee or group of employees and a carrier or carriers growing out of griev-

ances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, *shall* be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Petitioner's grievance was pending and unadjusted on June 21, 1934.

By Section 153 (m) the Adjustment Board is authorized to hear the dispute and to make such award as it deems proper under the facts of the case. The Act in Section 153 (q) contains its own statute of limitations, i.e., two years after the Adjustment Board's award:

In the instant case petitioner claims the benefits of the collective bargaining agreement between the Brotherhood of Railroad Trainmen and the Illinois Central Railroad Company. He specifically relies on Article 22 (D) of the agreement (R. p. 15), which is as follows:

"Yardmen or switchtenders taken out of the service or censured for cause, shall be notified by the Company of the reason therefor, and shall be given a hearing within five days after being taken out of the service, if demanded, and if held longer shall be paid for all time so held at their regular rates of pay. Yardmen or switchtenders shall have the right to be present and to have an employee of their choice at hearings and investigations to hear the testimony, and ask questions which will bring out facts pertinent to the case. They shall also have the right to bring such witnesses as they desire to give testimony, and may appeal to higher officers of the Company in case the decision is unsat-

isfactory. Such decision shall be made known within three days at New Orleans and at other points ten days after the hearing, or yardmen or switchtenders shall be paid for all time lost after the expiration of three days at New Orleans and ten days at other points. In case the suspension or dismissal or censure is found to be unjust, yardmen and switchtenders shall be reinstated and paid for all time lost."

His whole case is pitched on the last sentence of that article. That sentence provides the right, the remedy and redress. Petitioner claims as a third party beneficiary. As such, he must take the agreement as he finds it. If he elects to take the benefits of the agreement he must take its burdens also. "Qui sentit commodum sentire debet et onus." *Broom's Legal Maxims* (7th ed., 1874), p. 705; *Yazoo and M. V. R. Co. v. Webb*, 64 F. 2d 902. Phrased differently: "One may not select the desirable morsels served by his contract and toss the less choice parts beneath the table." *Northern State Contracting Co. v. Swope*, 271 Ky. 140, 111 S. W. 2d 610. The hearings and appeals provided in the article quoted are obviously what the Congress had in mind when it required by Section 153 (i) that "the disputes * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes," etc.

This record shows that petitioner was familiar with Article 22 (D) of the agreement. The right of action he asserts depends on it. In fact, he set in motion the machinery provided in Article 22 (D) for determining the justness or unjustness of his discharge, but he failed and refused to prosecute the appeal he took from the superintendent's decision, abandoned the appeal and took his case to court. In this situation it was and is the contention of the respondent that under both the Railway Labor Act and

the agreement made pursuant thereto it was petitioner's duty to exhaust the remedies provided by the agreement before resorting to the courts. Indeed, it logically follows that his only redress is that provided in the agreement, i.e., reinstatement and payment for all time lost. Respondent goes further. It contends that the word "may" in the paragraph of the Act quoted above, is mandatory, and that before petitioner can resort to the courts he must have a favorable award from the National Railroad Adjustment Board. The Circuit Court of Appeals and the district court held that the foregoing statutory and contractual provisions are permissive only and that petitioner was not required to exhaust the contractual remedy, but could resort to the courts without seeking the relief provided in the agreement. This holding is contrary to the decision of the Circuit Court of Appeals for the Eighth Circuit in *Harrison v. Pullman Co.*, 68 F. 2d 826. That Court said in passing upon the right of an employee to seek redress in the courts for breach of such a contract of hiring:

"It is evident that this contract between the Pullman Company and its employees was entered into for the purpose of establishing a complete and explicit code for the adjustment of labor disputes involving, among other things, such questions of employment. Appellant in terms sues because of an alleged breach of his contract, and, to prevail, he must show that he has brought himself within its terms and has been unable to secure a satisfactory adjustment by the means therein expressly provided. This he has failed to do, and for this reason he is unable to present his case in court as a justiciable controversy."

See also:

Estes, et al., v. Union Terminal Co., 89 F. 2d 768;
St. Louis, B. & M. Ry. Co. v. Booker (Tex. Civ.
 App.), 5 S. W. 2d 856;

Cousins v. Pullman Co. (Tex. Civ. App.), 72 S. W. 2d 356;
Norfolk & W. Ry. Co. v. Harris, 260 Ky. 132, 84 S. W. 2d 69;
Reed v. St. Louis S. W. R. Co. (Mo. App.), 95 S. W. 2d 887;
Swilley v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.), 96 S. W. 2d 1082;
Wyatt v. Kansas City Sou. Ry. Co. (Tex. Civ. App.), 101 S. W. 2d 1082;
Caulfield v. Yazoo & M. V. R. Co., 170 La. 155, 127 So. 585;
Bell v. Western Ry., 228 Ala. 328, 153 So. 434;
Adams v. Southern P. Co., 204 Cal. 63, 266 Pac. 541, 57 A. L. R. 1066.

The Circuit Court of Appeals in the instant case recognized the fact that the Railway Labor Act has for one of its purposes the prompt and orderly settlement of all disputes growing out of the interpretation and application of agreements covering rates of pay, rules and working conditions; that by Title 45, U. S. C. A., Section 152, railroads and their employees are required to exert every effort to make and maintain collective bargaining agreements, and that all disputes between a carrier and its employees are required to be considered and decided with expedition in conferences between representatives designated and authorized to confer. Notwithstanding that both the railroad and the employee must submit grievances through the channels provided by the Act and the agreement, the Circuit Court of Appeals held that the employee is at liberty to ignore the provisions of the Act and the terms of the agreement and resort to the courts in the first instance.

We submit that this holding in effect thwarts the legislative purpose to prevent any interruption of interstate

commerce and to provide for the orderly settlement of disputes between railroads and their employees in the manner provided in collective bargaining agreements. If the individual employee may ignore the terms of the Act and of the collective bargaining agreement and go direct to the courts without exhausting the remedy and seeking the redress provided thereby, the Act, insofar as employees are concerned, is unenforceable and impotent to prevent the very threats to commerce that Congress sought to avoid.

Furthermore, if the adjustment of grievances may be left in the hands of juries in the several courts of the numerous states through which respondent operates there can be no repose under the collective bargaining agreement and the resulting inequalities of administration may lead to the very disturbances the Railway Labor Act was designed to prevent.

Respondent therefore submits that the judgment of the Circuit Court of Appeals finds ample support on this further ground, and hence is correct in any event and should not be disturbed.

CONCLUSION.

Respondent respectfully submits that the judgment below is correct and should be affirmed.

Respectfully submitted,

JAMES L. BYRD,
Jackson, Mississippi,
CLINTON H. McKAY,
Memphis, Tennessee,
Attorneys for Respondent.

E. C. CRAIG and
V. W. FOSTER, of Chicago, Illinois,
LUCIUS E. BURCH, JR., of Memphis, Tennessee,
Of Counsel.

CERTIFICATE.

Service of the foregoing Brief of Respondent is hereby
acknowledged, this the day of March, 1941.

Jackson, Mississippi,
Of Counsel for Petitioner.

BLANK PAGE

APPENDIX A.**Mississippi Code, 1930.****Section 2292. Actions To Be Brought in Six Years.**

All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

Section 2299. Actions To Be Brought in Three Years.

Actions on an open account or stated account not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three years next after the cause of such action accrued and not after.

5

APPENDIX B.

Railway Labor Act of Congress of May 20, 1926, as Amended June 21, 1934, 48 Stat. at L. 1185, 45 U. S. C. A. Section 151, et Seq.

Section 151. Definitions; "Railway Labor Act"

When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to chapter 1 of Title 49, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the district court of the United States for the District of Columbia; and the term "circuit court of appeals" includes the United States Court of Appeals for the District of Columbia.

This chapter may be cited as the "Railway Labor Act." (May 20, 1926, c. 347, Sec. 1, 44 Stat. 577; June 7, 1934, c. 426, 48 Stat. 926; June 21, 1934, c. 691, Sec. 1, 48 Stat. 1185; June 25, 1936, c. 804, 49 Stat. 1921.)

Section 151a. General Purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. (May 20, 1926, c. 347, Sec. 2, 44 Stat. 577, as amended June 21, 1934, c. 691, Sec. 2, 48 Stat. 1186.)

Section 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules or working conditions contrary to agreement or to section 156 forbidden

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this chapter.

Eighth. Notices of manner of settlement of disputes; posting

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organiza-

tions that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations; prosecution and penalties

The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than \$1,000 nor more than \$20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with

the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent. (May 20, 1926, c. 347, Sec. 2, 44 Stat. 577, as amended June 21, 1934, c. 691, Sec. 2, 48 Stat. 1186.)

Section 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards

There is hereby established a Board, to be known as the "National Railroad Adjustment Board," the members of which shall be selected within thirty days after June 21, 1934, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the

employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this chapter.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office

of a member of the Adjustment Board, or in case of a vacancy in such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f)

of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance, in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees,

signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(1) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee," to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon

request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail

he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(r) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(s) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(t) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(u) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions

and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice-chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(v) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in

keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (1) hereof, with respect to a division of the Adjustment Board.

Second. Establishment of system, group or regional boards by voluntary agreement.

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board. (May 20, 1926, c. 347, Sec. 3, 44 Stat. 578, as amended June 21, 1934, c. 691, Sec. 3, 48 Stat. 1189.)

Section 154. National Mediation Board
(Omitted)

Section 155. Functions of Mediation Board

(Omitted)

Section 156. Procedure in changing rates of pay, rules and working conditions

(Omitted)

Section 157. Arbitration

(Omitted)

Section 158. Agreement to arbitrate; form and contents; signatures and acknowledgment; revocation

(Omitted)

Section 159. Award and judgment thereon; effect of chapter on individual employee

Omitted down to paragraph Eighth, which is as follows:

Eighth. Duty of employee to render service without consent; right to quit. Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent. (May 20, 1926, c. 347, Sec. 9, 44 Stat. 585.)

Section 160. Emergency Board

(Omitted)

Section 161. Effect of partial invalidity of chapter

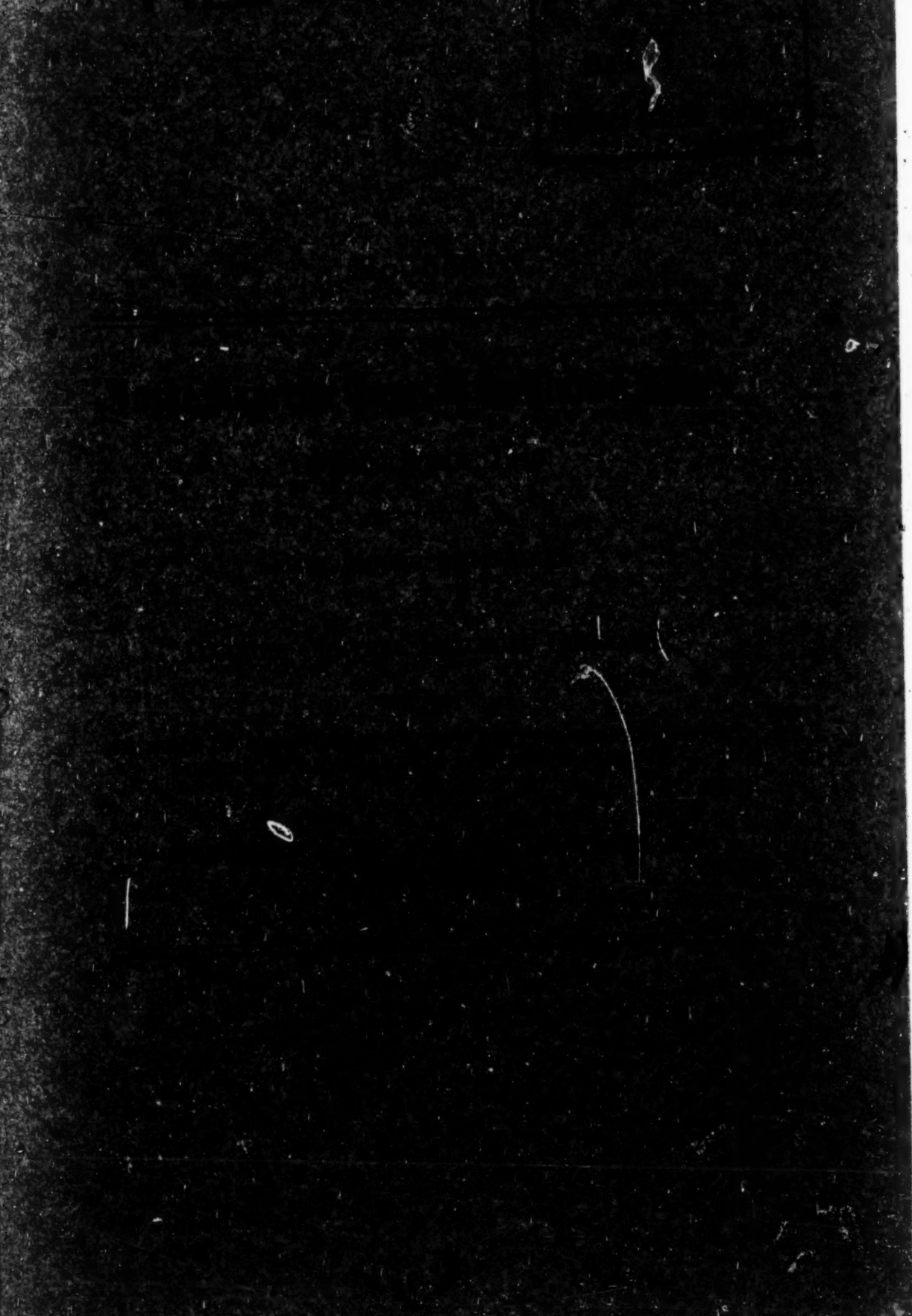
(Omitted)

Section 162. Appropriation
(Omitted)

Section 163. Repeal of prior legislation; exception
(Omitted)

**Section 164. Advertisements for proposals for purchases
or services rendered for Board of Mediation, including ar-
bitration boards.**
(Omitted)

BLANK PAGE



BLANK PAGE

INDEX

	Page
The question to be considered in this memorandum.....	1
Statute involved.....	2
Statement.....	3
Argument.....	6
1. The Act itself.....	7
2. The immediate legislative history of the 1934 Act.....	14
3. The historical background.....	17
4. The practice of the courts.....	27
5. The practice of the present Board.....	31
Summary and recommendation.....	37

CITATIONS

Cases:

<i>Aden v. L. & N. Ry. Co.</i> , 276 S. W. 511.....	29
<i>Amalgamated Utility Workers v. Consolidated Edison Co.</i> , 309 U. S. 261.....	11
<i>Bell v. Western Railway</i> , 228 Ala. 328, 153 So. 434.....	30
<i>Burke v. Morphy</i> , 109 F. (2d) 572, certiorari denied, 310 U. S. 635.....	10
<i>Chambers v. Davis</i> , 128 Miss. 613, 91 So. 346.....	29
<i>Chicago & North Western Railway Co., In the Matter of</i> (N. D. Ill. No. 60448, opinion of Special Master re Claim No. 1019, December 16, 1940).....	9
<i>Clark v. C., N. O. & T. P.</i> , 258 Ky. 197, 79 S. W. (2d) 704.....	29
<i>Cook v. Des Moines Union Railway Co.</i> , 16 F. Supp. 810.....	10, 11
<i>Cousins v. Pullman Co.</i> , 72 S. W. (2d) 356.....	30
<i>Donovan v. Travers</i> , 285 Mass. 167, 188 N. E. 705.....	29
<i>Estes v. Union Terminal Company</i> , 89 F. (2d) 768.....	35
<i>Florestano v. N. P. R. Co.</i> , 198 Minn. 203, 269 N. W. 407.....	29
<i>Franklin v. Penn-Reading Seashore Lines</i> , 122 N. J. Eq. 205, 193 A. 712.....	29
<i>George v. C., R. I. & P.</i> , 183 Minn. 610, 235 N. W. 673.....	29
<i>Gooch v. Ogden Union Railway, N. R. A. B.</i> , 2d Div. Award No. 514.....	34
<i>Gordon v. Hawkins</i> , 66 S. W. (2d) 432.....	29
<i>Great Northern Railway Co. v. Merchants Elevator Co.</i> , 259 U. S. 285.....	13
<i>Gregg v. Starks</i> , 188 Ky. 834, 224 S. W. 459.....	29
<i>Harrison v. Pullman Company</i> , 68 F. (2d) 826.....	30

Cases—Continued.

	Page
<i>Henry v. Twichell</i> , 286 Mass. 106, 189 N. E. 593.....	29
<i>L. & N. R. Co. v. Bryant</i> , 263 Ky. 578, 92 S. W. (2d) 749.....	29
<i>Lane v. Union Terminal Co.</i> , 12 F. Supp. 204.....	10
<i>Ledford v. Chicago, M., St. P. & P. R. Co.</i> , 298 Ill. App. 298, 18 N. E. (2d) 568.....	30, 34, 40
<i>Lehon v. City of Atlanta</i> , 242 U. S. 53.....	41
<i>Long v. B. & O. R. Co.</i> , 155 Md. 265, 141 Atl. 504.....	29
<i>Long v. Van Osdale</i> , 26 N. E. (2d) 69.....	30, 41
<i>Louisville Lodge No. 10, Association of Colored Railroad Trainmen v. National Railroad Adjustment Board, First Division</i> (N. D. Ill., No. 45687), decided February 8, 1937.....	35
<i>Lyons v. St. Joseph Belt Ry. Co.</i> , 232 Mo. App. 575, 84 S. W. (2d) 933.....	29
<i>Mallehan v. Texas & Pacific Ry. Co.</i> , 87 S. W. (2d) 771.....	30
<i>Malone v. Gardner</i> , 62 F. (2d), 15.....	10
<i>Mansell v. Texas & Pacific Ry. Co.</i> , 137 S. W. (2d) 997.....	10
<i>Mallock v. Gulf C. & S. F. Railway</i> , 99 S. W. (2d) 1056.....	30
<i>McCoy v. St. Joseph Belt Ry. Co.</i> , 229 Mo. App. 506, 77 S. W. (2d) 175.....	29
<i>McDermott v. New York Central R. Co.</i> , 32 F. Supp. 873.....	10
<i>McGee v. St. Joseph Belt Ry. Co.</i> , 233 Mo. App. 111, 93 S. W. (2d) 1111.....	29
<i>Moore v. Y. & M. V. Ry.</i> , 176 Miss. 65, 166 So. 395.....	29
<i>Mosshamer v. Wabash R.</i> , 221 Mich. 407, 191 N. W. 210.....	29
<i>Myers v. Bethlehem Shipbuilding Corporation</i> , 303 U. S. 41.....	41
<i>National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.</i> , 303 U. S. 261.....	32
<i>Nord v. Griffin</i> , 86 F. (2d) 481, certiorari denied, 300 U. S. 673.....	9, 35
<i>Parrish v. Chesapeake & Ohio R. Co.</i> , 62 F. (2d) 20.....	10
<i>Pennsylvania R. R. Co. v. Puritan Coal Co.</i> , 237 U. S. 121.....	13
<i>Pennsylvania Railroad Company v. Railroad Labor Board</i> , 261 U. S. 72.....	20, 28
<i>Pennsylvania R. R. Co. v. Sonman Shaft Coal Co.</i> , 242 U. S. 120.....	13
<i>Pennsylvania Railroad System and Allied Lines Federation v. Pennsylvania Railroad Company</i> , 267 U. S. 203.....	20
<i>Piercy v. L. & N. Ry.</i> , 198 Ky. 477, 248 S. W. 1042.....	29
<i>Reed v. St. Louis S. W. Ry.</i> , 95 S. W. (2d) 887.....	30
<i>Ryan v. N. Y. C. R. Co.</i> , 267 Mich. 202, 255 N. W. 365.....	29
<i>Smith v. Illinois Bell Tel. Co.</i> , 270 U. S. 587.....	41
<i>Stephenson v. New Orleans and N. E. R. Co.</i> , 180 Miss. 147, 177 So. 509.....	11
<i>Swilley v. Galveston, etc., Railway</i> , 96 S. W. (2d) 107.....	30
<i>Tank Car Corp. v. Terminal Co.</i> , 308 U. S. 422.....	42

Cases—Continued.

	Page
<i>Texas & New Orleans R. Co. v. Brotherhood of Railway Clerks</i> , 281 U. S. 548.....	20, 21
<i>Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.</i> , 204 U. S. 426.....	13
<i>Texas & Pacific Ry. Co. v. Rigsby</i> , 241 U. S. 33.....	12
<i>Virginian Ry. Co. v. System Federation No. 40</i> , 300 U. S. 515.....	21, 32
<i>Wilson v. New</i> , 243 U. S. 332.....	18
<i>Wyatt v. Kansas City Ry. Co.</i> , 101 S. W. 1082.....	30
<i>Yazoo & M. V. R. Co. v. Webb</i> , 64 F. (2d) 902.....	10
<i>Youmans v. Charleston & W. C. Ry. Co.</i> , 175 S. C. 99, 178 S. E. 671.....	30

Statutes:

Bituminous Coal Act, c. 127, 50 Stat. 72 (15 U. S. C., Secs. 828-851).....	12
Civil Aeronautics Act, c. 601, 52 Stat. 973 (49 U. S. C., Sec. 676).....	12
Interstate Commerce Act, c. 104, 24 Stat. 379 (49 U. S. C., Sec. 22).....	12
Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424 (13 U. S. C., Sec. 905).....	12
National Labor Relations Act, c. 372, 49 Stat. 449 (29 U. S. C., Sec. 159):	
Sec. 9 (a).....	32
160 (a).....	11
Packers and Stockyards Act, c. 64, 42 Stat. 159 (7 U. S. C., Secs. 181-231).....	12
Railway Labor Act of 1926, c. 347, 44 Stat. 577, Sec. 3.....	26
Railway Labor Act as amended June 21, 1934, c. 691, 48 Stat. 1185 (45 U. S. C., Secs. 151-163):	
Sec. 2.....	8
Sec. 3.....	2, 6, 7, 11
Safety Appliance Act, c. 160, 36 Stat. 279; c. 225, 35 Stat. 476 (45 U. S. C., Secs. 15, 19).....	12
Securities and Exchange Commission statutes:	
c. 38, 48 Stat. 74 (15 U. S. C., Sec. 77 p).....	12
c. 404, 48 Stat. 881 (15 U. S. C., Sec. 78 bb).....	12
c. 687, 49 Stat. 803 (15 U. S. C., Sec. 79 p).....	12
c. 411, 53 Stat. 1149 (15 U. S. C., Sec. 77 www (b)).....	12
Transportation Act, 1920, c. 91, 41 Stat. 469, Title III:	
Sec. 302.....	20
Sec. 303.....	20
Sec. 307.....	20

Miscellaneous:

Attorney General's Committee on Administrative Procedure:	
Final Report.....	10, 31
Monograph No. 17, pp. 8-10.....	31

Miscellaneous—Continued.

	Page
Inquiry of the Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board, and Historical Background and Growth of Machinery Set-up for the Handling of Railroad Labor Disputes, 1888-1940 (referred to as <i>Compilation</i>)-----	2, 18, 19, 20, 21, 23, 31, 32, 33, 42, 43
78 Cong. Rec. 11718-----	14
78 Cong. Rec. 12390-12393, 12402-----	37
Garrison, Lloyd K., <i>The National Railroad Adjustment Board</i> , 46 Yale L. J. 567-----	39
Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7650, 73d Cong., 2d Sess.-----	15,
	16, 24, 25, 36
Hearings before Senate Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess.-----	15, 16, 25
H. Rept. No. 1944, 73d Cong., 2d Sess.-----	14, 24
Op. Atty. Gen., Vol. 39, No. 113-----	33
Report of the Director General for the Fourteen Months Ending March 1, 1920, p. 15-----	19
S. Rept. No. 779, 68th Cong., 1st Sess.-----	22
S. Rept. No. 1065, 73d Cong., 2d Sess.-----	14
Spencer, William H., <i>The National Railroad Adjustment Board</i> (University of Chicago Press, 1938), p. 39, <i>Compilation</i> , Appendix, p. 189-----	35, 37
Witmer, <i>Collective Labor Agreements in the Courts</i> , 48 Yale L. J. 195, 224 (1938)-----	27
Wolf, <i>The Railroad Labor Board</i> , pp. 50-57-----	18, 19, 21, 22

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 550

EARL MOORE, PETITIONER

v.

ILLINOIS CENTRAL RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**MEMORANDUM FOR THE UNITED STATES AS
AMICUS CURIAE**

**THE QUESTION TO BE CONSIDERED IN THIS
MEMORANDUM**

One of the issues in this case upon which the Court may find it necessary to pass is whether a person claiming rights under a collective bargaining agreement between a railroad and its employees may bring suit for breach of the agreement in the courts without first instituting proceedings before the National Railroad Adjustment Board. Decision of this question rests largely

upon the intention of Congress in amending the Railway Labor Act in 1934 so as to create the National Railroad Adjustment Board. It is the purpose of this memorandum to bring together for the information of the Court the facts as to the legislative and historical background of the amendment, and also to suggest the considerations involved in the question of statutory construction. The issue here considered is to be distinguished from another question raised in the case—whether an employee must, as a matter of contract law, avail himself of the remedial machinery established by a collective bargaining agreement before suing in court.¹

STATUTE INVOLVED

The statute involved is the Railway Labor Act as amended June 21, 1934 (c. 691, 48 Stat. 1185, 45 U. S. C., Secs. 151-163), and particularly Section 3 thereof, which creates and defines the powers of the National Railroad Adjustment Board. The entire Act is printed at pp. 74-87 of the Appendix to a compilation of material on the Adjustment Board entitled "Inquiry of the Attorney General's Committee on Administrative Procedure relating to the National Railroad Adjustment Board, and Historical Background and Growth of Machinery

¹ Although it has been said that the provisions of the Railway Labor Act are to be regarded as incorporated in railroad collective bargaining agreements, this does not help in determining how the statute is to be construed before it is given such effect.

Set Up for the Handling of Railroad Labor Disputes, 1888-1940" (hereinafter referred to as *Compilation*) copies of which will be distributed to the Court.²

STATEMENT

The facts, insofar as relevant to the point here to be considered, are as follows:

Petitioner, Earl Moore, was a switchman employed in the Jackson Yards of the Alabama and Vicksburg Railway Company (R. 103) and a member of the Switchmen's Union of North America, which had negotiated the agreement for yardmen on that carrier (R. 112, 136). In June 1926 respondent, Illinois Central Railroad Company, took over the operations of the Alabama and Vicksburg; the Illinois Central had a contract covering yardmen with the Brotherhood of Railroad Trainmen (R. 112, 162). Through negotiations with the Brotherhood, but not with the Switchmen's Union, the seniority rosters in both the old and new Jack-

² This volume is a compilation of most of the pertinent documentary material relating to the National Railroad Adjustment Board. It contains in full the reports of and proceedings before the Attorney General's Committee on Administrative Procedure dealing with the Adjustment Board, and reprints the executive orders, collective labor agreements and statutes disclosing the history of the Adjustment Board and also the leading speeches and articles describing its operation. This publication was compiled by Harry E. Jones, Executive Secretary, Eastern Committee for the National Railroad Adjustment Board, New York City. Most of the documents hereinafter referred to are printed in the Appendix to the volume (the *pink* pages).

son yards of the Illinois Central were consolidated (R. 110-111, 162-3, 137, 133, 168). Petitioner continued to work for the carrier, but was idle at times as a result of a consequent reduction in his seniority listing (R. 45-46). In 1932 he brought suit in the state courts of Mississippi for damages for this partial unemployment (R. 113, 42). This suit was unsuccessful, the State Supreme Court holding that he had accepted his new seniority rating by continuing to work for the company for a number of years after it had been promulgated (R. 48-52). In February 1933 petitioner was discharged (R. 96, 115). Although the company claimed that he was discharged because of slowness and irregularity in his work, the District Court in this case found that in fact he was discharged for having sued the company (R. 201).

After 1926 he joined the Brotherhood of Railroad Trainmen but was expelled from that organization for non-payment of dues (R. 112, 165, 167). He continued to be represented before the carrier by the head of the local branch of the Switchmen's Union (R. 112, 116, 136).

After his discharge petitioner was given a hearing by the Superintendent, but to no avail (R. 115-118). He then filed this suit in the Mississippi courts for breach of Article 22 D (R. 15)³ of the

³ This paragraph of the agreement reads as follows (R. 15):
Yardmen or switchtenders taker out of the service or censured for cause, shall be notified by the Company of the

agreement between the carrier and the Brotherhood, claiming that he had been unjustly dismissed from service and was entitled to be paid for time lost (R. 1-3).

After the petitioner had lost in the Mississippi Circuit Court, obtained a reversal and remand in the Mississippi Supreme Court,⁴ and amended his complaint so as to pray for more than \$3,000 damages (R. 56-57), the case was removed to the United States District Court (R. 57-58). Respondent filed a number of special pleas (R. 65-77), and in addition a plea in abatement, alleging that petitioner had failed to appear at the appeal before the general superintendent of the railroad, had never requested any decision from higher officers of the

reason therefor, and shall be given a hearing within five days after being taken out of service, if demanded, and if held longer shall be paid for all time so held at their regular rates of pay. Yardmen or switchtenders shall have the right to be present and to have an employee of their choice at hearings and investigations to hear the testimony, and ask questions which will bring out facts pertinent to the case. They shall also have the right to bring such witnesses as they desire to give testimony, and may appeal to higher officers of the Company in case the decision is unsatisfactory. Such decision shall be made known within three days at New Orleans and at other points ten days after the hearing, or yardmen or switchtenders shall be paid for all time lost after the expiration of three days at New Orleans and ten days at other points. In case the suspension or dismissal or censure is found to be unjust, yardmen or switchtenders, shall be reinstated and paid for all time lost.

⁴ See *Moore v. Illinois Central Railroad Company*, 180 Miss. 276, 176 So. 593.

carrier, and that the dispute had not been referred to the First Division of the National Railroad Adjustment Board (R. 60-62). The District Court overruled these pleas (R. 86-94), and after hearing the evidence entered a judgment in favor of the petitioner (R. 200-204). The Circuit Court of Appeals reversed, holding that the case was barred by the three-year statute of limitations for oral contracts and that the prior decision of the Mississippi Supreme Court that the six-year statute applied was not binding upon it (R. 217-224). The court also considered the other defenses and held that the petitioner was not required to go to the Adjustment Board before seeking redress in the courts (R. 225-226).

ARGUMENT

The National Railroad Adjustment Board, established by Section 3 of the Railway Labor Act, as amended in 1934, is a board composed of an equal number of representatives selected by the carriers and by the national labor organizations of railroad employees. The Board consists of four divisions, each having jurisdiction over certain crafts and classes of employees. The jurisdiction of the Board is limited to grievances and cases involving the interpretation or application of agreements concerning rates of pay, rules or working conditions. Major disputes as to what such rates of pay, rules and working conditions shall be are to be

handled by the National Mediation Board and the arbitration machinery set up elsewhere in the Act.

If a division of the Adjustment Board deadlocks upon an award, provision is made for the selection of a referee. The referee may vote as a member of the division. If a carrier does not comply with an order of the Adjustment Board, the person for whose benefit the order was made may file suit in a United States District Court and the findings and order of the Board are made *prima facie* evidence of the facts therein stated. The divisions of the Board are authorized to establish regional adjustment boards, and individual carriers or groups of carriers and their employees, acting through representatives, are authorized to establish system, group, or regional boards for the purpose of adjusting disputes which would otherwise go before the national board.

1. THE ACT ITSELF

The Act nowhere states whether or not the jurisdiction of the Adjustment Board to interpret railroad labor agreements or to hear grievances arising out of them is to be exclusive or that the courts are, or are not, to be ousted of jurisdiction over such matters.

Section 3, First (i), of the Act provides that disputes growing out of grievances or the interpretation or application of agreements:

* * * shall be handled in the usual manner up to and including the chief operating

officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes *may* be referred * * * to the appropriate division of the Adjustment Board * * * [Italics supplied.]

This language we submit is consistent with either interpretation of the statute. As the court below held (R. 225), the mandatory "shall" for handling matters through the operating officers of the carrier may reasonably be regarded merely as a prerequisite to the institution of proceedings before the Board rather than as a statutory requirement that all disputes of this type be so handled. The use of "may" in connection with taking cases to the Board lends some support to this construction. On the other hand "shall" can be construed literally as applicable to all such disputes, and the failure to repeat the word in the following clause can be readily explained on the ground that parties were not to be required to seek review of the decision by the carrier officials by taking the case to the Adjustment Board, unless they saw fit.

Other provisions of the Act are of little help. Section 2 declares that the "General Purposes" of the Act are—

- (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; * * *
- (5) to provide for the prompt and orderly settlement of all dis-

putes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

These pronouncements are entirely consistent with the notion that any other means of arriving at a peaceful settlement of such disputes, presumably including judicial proceedings, may be utilized, but they do not compel such an interpretation.

Few judicial decisions under the Railway Labor Act throw much light upon the present problem. Apart from the declaration by the court below in this case that recourse to the Adjustment Board is not a necessary prerequisite to the institution of judicial proceedings there has been no direct holding on the question by any federal court.⁵ The Seventh Circuit Court of Appeals, in a case in which this Court denied certiorari, has indicated, by way of dictum, that it takes the same view. *Nord v. Griffin*, 86 F. (2d) 481, 483-484 (C. C. A. 7th), certiorari denied, 300 U. S. 673. In that case the court said:

Nor do we believe that the Railroad Labor Act in any way limited the jurisdiction of the District Court as previously conferred by 28 U. S. C. A., § 41 (1). Section 3, subdivision (p), * * * provides: "If a

⁵ There is a decision to the same effect by a Special Master in *In the Matter of Chicago & North Western Railway Co.* (N. D. Ill., No. 60,448), opinion of Special Master re Claim No. 1019, December 16, 1940.

carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides * * * a petition," etc. The clear intent was not to limit the previously existing jurisdiction of the court, but rather to extend that jurisdiction to cases to which it had not previously applied.

Other decisions touching upon different phases of the Adjustment Board's activities also seem to reflect an assumption that the courts are not deprived of jurisdiction over cases arising out of railway labor contracts.⁶ The Final Report of the Attorney General's Committee on Administrative Procedure declares that "The courts have held that they [employees] may assert contract claims against carriers directly in court" (p. 188).

⁶ See *Burke v. Morphy*, 109 F. (2d) 572 (C. C. A. 2nd), certiorari denied, 310 U. S. 635; *Malone v. Gardner*, 62 F. (2d) 15 (C. C. A. 4th); *Parrish v. Chesapeake & Ohio R. Co.*, 62 F. (2d) 20 (C. C. A. 4th); *Yazoo & M. V. R. Co. v. Webb*, 64 F. (2d) 902 (C. C. A. 5th); *McDermott v. New York Central R. Co.*, 32 F. Supp. 873 (S. D. N. Y.); *Cook v. Des Moines Union Railway Co.*, 16 F. Supp. 810 (S. D. Iowa); *Lane v. Union Terminal Co.*, 12 F. Supp. 204 (N. D. Tex.). The opinion of the Supreme Court of Texas in *Mansell v. Texas & Pacific Ry. Co.*, 137 S. W. (2d) 997, contains a suggestion that the Board's jurisdiction may generally be exclusive, but not when the cause of action arose before the 1934 amendment to the Railway Labor Act. The facts of both the *Mansell* case and the present case fall within the latter category.

It can be argued that the establishment of the Adjustment Board in itself manifests a congressional intention that all disputes coming within its jurisdiction be submitted to it rather than to the courts.⁷ But an equally impressive case can be made for the proposition that the failure of Congress to declare that the Board was to have exclusive jurisdiction indicates that other remedies previously available were not to be destroyed.

Examination of the language of statutes creating other administrative bodies and of the decisions under them reveals the absence of any uniform legislative or judicial policy which might be controlling here. In some instances Congress has specified that an administrative remedy is to be exclusive, as in the National Labor Relations Act⁸

⁷ A requirement that parties first resort to the Adjustment Board does not mean that a proceeding based upon the Railway Labor Act will not eventually be heard *de novo* in court. Section 3, First (p), of the Act provides that the successful party before the Board may sue in the District Courts and that the suit shall proceed as other civil suits, except that the findings of the Board shall be *prima facie* evidence of the facts therein stated. Cf. *Cook v. Des Moines Union Railway Co.*, 16 F. Supp. 810, wherein the District Court granted greater relief than that approved by the Board. It has also been held that parties who have lost before the Board may still sue on their original contract rights, although this has not been conclusively determined. See *Stephenson v. New Orleans and N. E. R. Co.*, 180 Miss. 147, 177 So. 509, where the state court held that the Adjustment Board had had no jurisdiction and enjoined compliance with its ruling.

⁸ c. 372, 49 Stat. 449, 29 U. S. C., Section 160 (a); *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261.

and the Longshoremen's and Harbor Workers' Compensation Act.⁹ Frequently it is clear from the fact that the statute regulates an entirely new field that only statutory remedies are to be available.¹⁰ On the other hand, Congress has also specifically provided, as in the Interstate Commerce Act,¹¹ the Civil Aeronautics Act¹² and the statutes administered by the Securities and Exchange Commission,¹³ that existing remedies are not to be abridged. And some statutes, such as the Safety Appliance Act,¹⁴ which contain no express provision one way or the other, have been construed as permitting private persons to enforce their rights in courts as well as before the administrative tribunal. It has been held that even where, as in the Interstate Commerce Act, the statute contains an express proviso that—

* * * nothing in this act contained shall
in any way abridge or alter the remedies
now existing at common law or by statute,

⁹ c. 509, 44 Stat. 1424, 33 U. S. C., Section 905.

¹⁰ See, e. g., Bituminous Coal Act, c. 127, 50 Stat. 72, 15 U. S. C., Sections 828-851; Packers and Stockyards Act, c. 64, 42 Stat. 159, 7 U. S. C., Sections 181-231.

¹¹ c. 104, 24 Stat. 379, 49 U. S. C., Section 22.

¹² c. 601, 52 Stat. 973, 49 U. S. C., Section 676.

¹³ c. 38, 48 Stat. 74, 15 U. S. C., Section 77 p; c. 411, 53 Stat. 1149, 15 U. S. C., Section 77 www (b); c. 404, 48 Stat. 881, 15 U. S. C., Section 78 bb; c. 687, 49 Stat. 803, 15 U. S. C., Section 79 p.

¹⁴ c. 160, 36 Stat. 298, c. 225, 35 Stat. 476, 45 U. S. C., Sections 15, 19; *Texas & Pacific Ry. Co. v. Rigsby*, 241 U. S. 33, 39.

but the remedies of this act are in addition to such remedies.

questions of "administrative power and discretion" must first go to the Commission rather than to the courts in order to avoid a result inconsistent with the general policy of the Act. *Pennsylvania R. R. Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120, 123-124; *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 446-447; *Pennsylvania R. R. Co. v. Puritan Coal Co.*, 237 U. S. 121, 129; *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U. S. 285.

This variety of statutes and decisions merely shows that the present problem cannot be solved by any automatic rule pursuant to which a statute establishing an administrative body is inevitably construed in one way or the other. In each case all of the manifold factors which guide courts in construing statutes are given consideration, and the determination made by the court as to what Congress would have intended in the particular statute before the court.

When a statute creates new rights and establishes an agency to administer them, it may normally be presumed, even in the absence of express language to that effect, that the legislature intended the agency to have exclusive primary jurisdiction. But the Adjustment Board does not administer or pass upon rights created by the Railway Labor Act, but upon contract rights previ-

ously recognized and enforced in other forums. The Board is also not strictly comparable to other administrative bodies, in that it stems from boards established by agreement whose functions were clearly the settlement of disputes through adjustment rather than adjudication. See pp. 17-25, *infra*. It is conceivable that Congress could have designed the Adjustment Board either as a supplement to or a substitute for the existing remedies for breach of railway labor contracts. In view of the inconclusiveness of the Act upon this point, it is necessary to turn to secondary sources, such as the general purposes and background of the Act in order to determine how it should be construed.

2. THE IMMEDIATE LEGISLATIVE HISTORY OF THE 1934 ACT

The committee reports¹⁵ and the debates on the floor of Congress¹⁶ do not amplify the language of the Act, insofar as specific evidence of legislative intention on the present question is concerned.

At hearings before committees of the House and Senate the proposed amendments to the Railway

¹⁵ H. Rept. No. 1944, 73d Cong., 2d Sess.; S. Rept. No. 1065, 73d Cong., 2d Sess. See pp. 24-28, *infra*.

¹⁶ The only remark which might seem to bear upon the question is that of Representative Mead, supporting the bill, who stated that " * * * this bill sets up an orderly procedure for the settlement of grievances and disputes that arise upon the railroads of the country. It augments and supplements existing law; * * *" (78 Cong. Rec. 11718). This suggests that pre-existing judicial remedies were not to be destroyed.

Labor Act were explained and supported by the Federal Coordinator of Transportation, Mr. Joseph B. Eastman. His remarks do not at any point touch upon the relation of the Adjustment Board to the courts. He stated that "unadjusted disputes * * * *may* be referred" to the Adjustment Board, and that "nothing in the act shall be construed to prevent a carrier or group of carriers from agreeing with employees, or any class thereof, upon another method of settling disputes."¹⁷

But he does advance as one of the advantages of a national board, as contrasted with regional boards, the desirability of "a more uniform settlement of these disputes"; this he felt would ultimately "tend to reduce very materially the number of disputes which could not be settled locally."¹⁸ In this connection he stated:

I also have the feeling that the national board will have a very distinct advantage, because it can establish certain precedents of general application which should furnish a guide for deciding cases locally. As a matter of fact the same rules are now interpreted in many different ways throughout the country, and that is one reason why grievances which arise remain unsettled, because there is disagreement as to what the

¹⁷ Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7650, 73d Cong., 2d Sess., p. 47.

¹⁸ Hearings before Senate Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess., pp. 154-155.

same language means and a great variety of interpretations. If we had one board, nation-wide, setting precedents in these matters, I think the tendency would be to establish guides which would enable a great many of the issues to be settled at home.¹⁹

* * * * *

Furthermore, I have the feeling that it is very desirable to have a more uniform settlement of these disputes. These matters that we are now dealing with are grievances. They are not the basic rates of pay or the basic working rules and the interpretation of those rules or grievances which men have, and it doesn't seem to me that it is necessary to have any number of different ways of disposing of those all over the country, and that the national board could soon set certain precedents which would discourage and limit the number of such disputes which would arise, because it would be perfectly clear what the outcome would be if they were preferred to the national board.²⁰

Uniformity in applying railway labor agreements is, of course, more likely to be achieved if all disputes must first go to a national board rather than to the numerous state and federal courts. Thus, although Mr. Eastman was speaking only of

¹⁹ House Hearings, *supra*, p. 48.

²⁰ Senate Hearings, *supra*, p. 155.

the advantages of national over regional adjustment boards, his remarks are also pertinent here.

The fact that there was no reference to judicial remedies during the entire legislative discussion suggests both that the courts have not cut a very important figure in resolving this type of dispute and also that some other method of settling such disputes is essential. But the establishment of special machinery to fill this need does not in and of itself manifest an intention, one way or the other, to deprive the courts of any jurisdiction which they may formerly have possessed. Judgment on that question can be exercised more intelligently in the light of the historical background of the Adjustment Board and the relationship between its predecessors and the courts.

3. THE HISTORICAL BACKGROUND

The present Board is the culmination of a long period of practice and experimentation in devising means of settling railway labor disputes without interruption to transportation. The status of the Board, which is unique among administrative agencies (if it be such an agency at all; see p. 31, *infra*) can only be understood in the light of this historical background.

The first predecessor of the Adjustment Board was the "Commission of Eight" created on March 19, 1917, by agreement of the railroads and the four train service Brotherhoods, to interpret an award

of the Committee of the Council of National Defense settling the eight-hour day controversy.²¹ This commission was composed of four representatives of the Brotherhoods and four of the carriers.²²

Shortly after the Government took over the railroads during the war, the Director General of Railroads, by order, established Railway Board of Adjustment No. 1, which was in substance and form a continuation of the Commission of Eight for train service employees.²³ The order, which made effective a "memorandum of understanding," previously reached between the Brotherhoods and the "directors for the railroads under government control," provided that "all controversies growing out of the interpretation or application of the provisions of the wage schedule or agreements which are not promptly adjusted by the officials and the employees on any one of the railroads operated by the Government *shall* be disposed of in" the manner described.²⁴ Deadlocked cases were referable to

²¹ See *Compilation*, pp. 403-404, and Appendix, pp. 18-19; Wolf, *The Railroad Labor Board*, pp. 50-57. The award was expressly made to become effective whether or not the Adamson Act was held constitutional. Although the settlement was obviously agreed upon before the decision of this Court in *Wilson v. New*, 243 U. S. 332, it was signed on March 19, 1917, the same day that the decision was rendered.

²² *Compilation* and Wolf, *loc. cit. supra*.

²³ See Wolf, *supra*, pp. 50 *et seq.*; *Compilation*, Appendix, pp. 19-22.

²⁴ The Board consisted of an equal number of representatives of the carriers and the labor organizations. Section 10 of the memorandum, in language similar to that in the pres-

the Director General; "but practically every case" was amicably settled by a majority vote of the Board.²⁵ During succeeding months two similar boards were established for the shopcrafts and for other national labor organizations.²⁶

This machinery was recognized as applicable only to the members of the major railway labor organizations signatory to the understanding.²⁷ By order of the Director General the cases of "employees not represented by Railway Boards of Adjustment" were to be handled by the individual or his representative in the same manner through the chief operating officer of the carrier, and then, if

ent Act, provided that "Personal grievances or controversies arising under interpretation of wage agreements, and all other disputes * * * covered by this understanding, will be handled in their usual manner by general committees of the employees up to and including the chief operating officer of the railroad (or someone officially designated by him), when, if an agreement is not reached, the chairman of the general committee of employees may refer the matter to the chief executive officer of the organization concerned; and if the contention of the employees' committee is approved by such executive officer" then the matter shall be jointly submitted to the board of adjustment. In the proceedings before the Board the employees were to be represented by the person designated by the chief executive officer of the organization concerned. *Ibid.*

²⁵ See *ibid.*; *Report of the Director General for the Fourteen Months Ending March 1, 1920*, p. 15.

²⁶ *Compilation*, Appendix, pp. 23-30; Wolf, *supra*.

²⁷ Wolf, *supra*, pp. 52-53.

not settled, submitted to the Division of Labor of the Railroad Administration.²⁸

These orders became inoperative after the carriers were returned to private ownership. Railway labor relations were subsequently governed by Title III of the Transportation Act, 1920 (c. 91, 41 Stat. 456). Although it had been proposed that adjustment boards be made compulsory, Section 302 of the 1920 Act provided only that—

* * * Railroad Boards of Labor Adjustment *may* be established by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof.²⁹

Such adjustment boards were to hear cases submitted by the carriers or labor organizations, or “upon the written petition signed by not less than 100 unorganized employees” (Section 303). If no adjustment board was established, or if an adjustment board failed to reach an agreement, the dispute was to be submitted to the Railroad Labor Board (Section 307).³⁰

²⁸ *Compilation*, Appendix, pp. 30–32.

²⁹ *Compilation*, Appendix, p. 33; Wolf, *supra*, pp. 91, 267.

³⁰ This Board was composed of three representatives of the public, three of management, and three of labor. Its functions are described in *Pennsylvania Railroad Company v. Railroad Labor Board*, 261 U. S. 72; *Pennsylvania Railroad System and Allied Lines Federation v. Pennsylvania Railroad Company*, 267 U. S. 203; *Texas & New Orleans Ry. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548.

Although the Act was passed in the belief that adjustment boards would be established, the carriers and the labor organizations were not able to agree upon whether national or system boards should be created.³¹ Accordingly, no general system of adjustment boards was set up. One result of this was that the Railroad Labor Board was swamped with a vast number of minor cases and was unable to devote adequate time to the larger issues with which it was expected primarily to deal.³²

Three regional adjustment boards, however, were created, by agreement between the four train-service brotherhoods and many of the carriers. These agreements were substantially similar to those entered into during the War; they provided that disputes "shall be" disposed of in the manner provided. Unsettled cases were to be certified to the Railroad Labor Board.³³

In 1926, after the break-down, for many reasons,³⁴ of the machinery established in Title III of the

³¹ Wolf, *supra*, pp. 267-273. As in 1934, the employees sought a national board and the carriers system boards.

³² *Ibid.*

³³ Wolf, *supra*, pp. 273-276; *Compilation*, Appendix, pp. 39-53. The agreements conformed to the statute in that, after submission to the chief operating officer of the carrier, disputes could be filed with the Board either by the chief of the labor organization or by petition of 100 unorganized employees.

³⁴ See Wolf, *supra*, pp. 358 *et seq.*; *Texas & New Orleans Ry. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548, 563; *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515, 542.

Transportation Act, the Railway Labor Act was enacted in its place (44 Stat. 577). Section 3 of this statute appeared to make the establishment of adjustment boards mandatory; it provided that—

* * * Boards of adjustment *shall* be created by agreement between any carrier or group of carriers, or the carriers as a whole, and its or their employees.³⁵

The section went on to state that disputes of the type here in question “shall be handled in the usual manner up to and including the chief operating officer of the carrier * * *; but, failing to reach an adjustment in this manner, that the dispute *shall be referred* to the designated adjustment board by the parties, or by either party * * *” (Section 3, First (c)).

As might have been anticipated, the change from “may” to “shall” in the 1926 Act did not in itself succeed in bringing agreement between carriers and employees as to the kind of adjustment board to be created. The carriers still insisted on system

³⁵ The labor organizations had previously supported the Howell-Barkley bill which was favorably reported to the Senate in 1924, but which failed to pass. See Senate Report No. 779, 68th Cong., 1st Sess.; Wolf, *supra*, pp. 406-415. This bill provided for national adjustment boards. Presumably the substitution in the 1926 bill of the provision for the establishment of boards by agreement only was a concession to the carriers in order to get them to join with the labor organizations in submitting the latter bill to Congress.

boards and the Brotherhoods on a national board.³⁶ The boards previously established for train service employees were continued, however, and a new board created for the southwestern region.³⁷ In addition, a number of system boards were created for other classes of employees.

But in many instances the carriers and the employees were unable to reach agreement on whether

³⁶ The situation was picturesquely described by Chairman Winslow of the Board of Mediation before the Senate Committee on Interstate Commerce, at the Hearings on the 1934 amendments (Hearings on S. 3236, 73d Cong., 2d Sess., p. 137), as follows:

"The provision in the present act for adjustment boards is in practice about as near a fool provision as anything could possibly be. [Laughter.] I mean this—that on the face of it they shall, by agreement, do so and so. Well, you can do pretty nearly anything by agreement, but how can you get them to agree? No way has yet been found, where difficulties have come up. But the curious part is that they can work entirely within the provisions of law and never agree, so you never get an adjustment board. Side A, for instance, wants a system board. Side B wants a regional board, to illustrate. And they are both subscribing to that provision of law; they both want boards; they are broken-hearted to think that they can't get them [laughter], but they never will agree on the board. So what good is it? It is utterly impractical and absolutely a mess. * * *

³⁷ *Compilation*, p. 410; Appendix, pp. 57-61. The new train service agreement was substantially the same as the earlier ones, except that it omitted the provision required by the 1920 Act for submission of cases by unorganized employees (*Ibid.*). The older agreements were modified so as to make unsettled cases referable to the Board of Mediation instead of to the Railroad Labor Board and so as to indicate that only organizations party to the agreement could submit cases to the Board (*Id.*, at 47, 49, 54, 56).

or not to establish boards of adjustment. See H. Rept. No. 1944, 73d Cong., 2d Sess., p. 3. Moreover, the 1926 Act contained no machinery to care for the cases in which the carrier and labor members of the Boards, who were equal in number, failed to agree. As a consequence, "Many thousands of these disputes have been considered by boards established under the Railway Labor Act; but the boards have been unable to reach a majority decision, and so the proceedings have been deadlocked" (H. Rept. No. 1944, 73d Cong., 2d Sess., p. 3). The Board of Mediation was flooded with these deadlocked cases, to be handled through mediation in addition to its other duties.³⁸ The result of the failure of the parties to agree to establish adjustment boards, or of the members of such boards to reach decisions was that, "unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce in order to secure an adjustment" (H. Rept. 1944, p. 3).

Because of these deficiencies in the operations of the 1926 Act, the 1934 amendments to the Railway Labor Act were adopted (48 Stat. 1185, 45 U. S. C., Sections 151-163). The House committee report, after reciting the above facts (which are

³⁸ See the testimony of Chairman Winslow before the House Committee on Interstate and Foreign Commerce (Hearings on H. R. 7650, 73d Cong., 2d Sess.), p. 72.

amply supported by the testimony before the congressional committee.³⁹) went on to declare—

This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service. This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes *may* be submitted if they shall not have been adjusted in conference between the parties. [Italics supplied.]

When the carriers and employees could agree to establish similar regional or system boards,⁴⁰ they were to be “exempt from the jurisdiction of this national board” (*id.*, p. 4). If a board deadlocked on a decision, impartial referees were to be chosen by the board members, or if necessary, by the Mediation Board. The House committee report concludes—

The committee is confident that this bill strengthens the Railway Labor Act, where it is necessary to do so, and feels sure that if the act is amended as proposed in this bill, it will provide effective and adequate machinery to adjust controversies between the

³⁹ See Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7650, 73d Cong., 2d Sess.; Hearings before Senate Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess.

⁴⁰ The representatives of the employees had insisted on a national board while the carriers had proposed compulsory regional boards. The Act provides for the former and permits the latter.

carrier managements and employees. It will assure employees the right to bargain collectively and will contribute immeasurably to the establishment and maintenance of industrial peace.

It is clear from the above outline of the background of the present statute that Congress created the National Railroad Adjustment Board as a successor to the boards established by agreement under earlier statutes. These agreements contained mandatory language, and under the law of contracts the boards therein established might for that reason be said to have exclusive primary jurisdiction over cases arising under contracts made by the parties to the agreement. It is inferable that Congress did not intend the new national board to have a narrower jurisdiction than its predecessors, and that accordingly, resort to the national board is also a necessary prerequisite to the institution of judicial proceedings. On the other hand it is possible to point to the substitution in 1934 of the less demanding "may" for the mandatory "shall" contained both in the earlier agreements and in the corresponding section (Section 3, First (c)) of the 1926 Railway Labor Act as manifesting a deliberate effort by Congress not to give the present board exclusive jurisdiction.

In this connection it should be observed that the agreements creating the earlier adjustment boards permitted only the labor organizations and not the individual employees to present matters to the

boards.⁴¹ (See p. 18, footnote 24; pp. 19-21; p. 23, footnote 37, *supra*.) These boards thus did not assume to protect the rights of individual employees if not sponsored by the labor organization, although it is generally recognized that such persons, in the absence of express contractual provisions to the contrary, have enforceable rights under labor agreements.⁴² Omission from the present statute of the requirement that cases be presented through the labor organization party to the agreement is some indication that individual employees were to be permitted to bring cases before the Board, and thus that the Board has jurisdiction over the whole field of disputes under railway labor agreements. But as we point out, *infra*, pp. 33-37, the Adjustment Board has in fact continued to operate along the same lines as its predecessors, and has refused to hear cases not submitted by the labor organizations. This, of course, weakens the inference which might otherwise be drawn as to the exclusive nature of the Board's jurisdiction under the present Act as contrasted with the earlier agreements.

4. THE PRACTICE OF THE COURTS

As has been suggested, it is not unreasonable to assume that Congress intended the present ad-

⁴¹ As required by the 1920 statute, agreements made between 1920 and 1926 also permitted 100 unorganized employees to file cases with the boards.

⁴² See Witmer, *Collective Labor Agreements in the Courts*, 48 Yale L. J. 195, 224 (1938).

justment board to occupy, in general, the same position *vis a vis* the courts in the railway labor structure as its predecessors. The practice of the courts in deciding cases under the prior statutes and agreements would thus be an indication as to whether the present Act was designed to deprive the courts of jurisdiction.⁴³

In view of the thousands of cases which came before the earlier adjustment boards, it must be assumed that most disputes arising where agreements were in effect were submitted to the boards. It is difficult to ascertain how many or what proportion of the cases were taken directly to court instead of going through a board. An examination of the reported decisions does not, of course, give any accurate indication of this, since most law suits do not reach the stage of requiring an opinion by an appellate court. Nevertheless, such reported opinions afford the only clue available.

⁴³ Most of the Federal cases arising both before and after 1934 have already been discussed, *supra*, pp. 9-10. In *Pennsylvania Railroad Company v. Railroad Labor Board*, 261 U. S. 72, 84, this Court stated generally, with respect to Title III of the 1920 Act, that it "was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employees or to enforce or protect them. *Courts can do that.*" [Italics supplied.] Although this remark was not directed at the adjustment board section of the Act, it does indicate in some slight degree that while the 1920 Act was in effect the jurisdiction of neither the Railroad Labor Board nor the adjustment boards was exclusive.

The cases may be grouped into several categories. There are—

(a) A considerable number in which the courts have assumed that they had jurisdiction to grant relief under railway labor contracts, without any reference to federal legislation or to the existence of an adjustment board.⁴⁴

⁴⁴ See, e. g., *Lyons v. St. Joseph Belt Ry. Co.*, 232 Mo. App. 575, 84 S. W. (2d) 933 (1937); *Mosshamer v. Wabash R.*, 221 Mich. 407, 191 N. W. 210 (1922); *Long v. B. & O. R. Co.*, 155 Md. 265, 141 Atl. 504 (1928); *Aden v. L. & N. Ry. Co.*, 276 S. W. 511 (1921); *Chambers v. Davis*, 128 Miss. 613, 91 So. 346 (1922); *Piercy v. L. & N. Ry.*, 198 Ky. 477, 248 S. W. 1042 (1923); *Henry v. Twichell*, 286 Mass. 106, 189 N. E. 593 (1934); *Donovan v. Travers*, 285 Mass. 167, 188 N. E. 705 (1934); *Gordon v. Hawkins*, 66 S. W. (2d) 432 (1933); *McCoy v. St. Joseph Belt Ry. Co.*, 229 Mo. App. 506, 77 S. W. (2d) 175 (1934); *Ryan v. N. Y. C. R. Co.*, 267 Mich. 202, 255 N. W. 365 (1934); *George v. C., R. I. & P.*, 183 Minn. 610, 285 N. W. 673 (1931); *L. & N. R. Co. v. Bryant*, 263 Ky. 578, 92 S. W. (2d) 749 (1936); *Moore v. Y. & M. V. Ry.*, 176 Miss. 65, 166 So. 395 (1936); *McGee v. St. Joseph Belt Ry. Co.*, 233 Mo. App. 111, 93 S. W. (2d) 1111 (1936); *Clark v. C., N. O. & T. P.*, 258 Ky. 197, 79 S. W. (2d) 704 (1935); *Franklin v. Penn-Reading Seashore Lines*, 122 N. J. Eq. 205, 193 A. 712 (1937); *Florestano v. N. P. R. Co.*, 198 Minn. 203, 269 N. W. 407 (1936); *Gregg v. Starks*, 188 Ky. 834, 224 S. W. 459 (1920). These cases arising before and after 1934 indicate the practice of the courts as to both the earlier adjustment boards and the present Board. Since the cases cited do not mention any adjustment board, we have included only cases involving train service employees, inasmuch as substantially all of this class of employees has been covered by adjustment boards ever since 1917. (See pp. 17-23, *supra*.)

(b) Cases holding that employees must exhaust procedural remedies set forth in labor agreements, including the provision for Adjustment Boards.⁴⁵

(c) Cases holding that an employee can go to court without availing himself of the remedies described in the contract or under the Act, where for one reason or another such action would be futile.⁴⁶

Although court decisions which do not discuss an issue lurking in the record do not carry much authority, the very fact that there had been numerous cases in the courts while the earlier boards were functioning is of significance in and of itself, if it be assumed that Congress intended the new board to occupy the same position in respect to the courts as did the old. A contrary inference can, however, be drawn from the rather fewer decisions requiring the use of the machinery provided in the contracts, on the theory that Congress intended the statute establishing the new board to have as great an effect as the agreements which it was replacing.

⁴⁵ *Harrison v. Pullman Company*, 68 F. (2d) 826 (C. C. A. 8th); *Bell v. Western Railway*, 228 Ala. 328, 153 So. 434; *Wyatt v. Kansas City Ry. Co.*, 101 S. W. 1082 (Tex. Civ. App.); *Swilley v. Galveston, etc., Railway*, 96 S. W. (2d) 107 (Tex. Civ. App.); *Matlock v. Gulf C. & S. F. Railway*, 99 S. W. (2d) 1056 (Tex. Civ. App.); *Reed v. St. Louis S. W. Ry.*, 95 S. W. (2d) 887; *Cousins v. Pullman Co.*, 72 S. W. (2d) 356 (Tex. Civ. App.).

⁴⁶ *Youmans v. Charleston & W. C. Ry. Co.*, 175 S. C. 99, 178 S. E. 671; *Long v. Van Osedale*, 26 N. E. (2d) 69 (Ind. App.); *Mallehan v. Texas & Pacific Ry. Co.*, 87 S. W. (2d) 771 (Tex. Civ. App.); *Ledford v. Chicago, M., St. Paul & P. R. Co.*, 298 Ill. App. 298, 306, 18 N. E. (2d) 568.

5. THE PRACTICE OF THE PRESENT BOARD

The National Railroad Adjustment Board established in 1934 differs in important respects from the boards upon which it was modeled. Although its members are still appointed and paid by the carriers and the labor organizations, it is created by statute and not by agreement, and the remainder of its staff must be approved and paid by the Government, through the National Mediation Board. When it deadlocks, referees are to be chosen, if necessary, by the Mediation Board. Its decisions are made enforceable in court, the findings of the Board being *prima facie* evidence of the facts found.

As a result of these differences, it is uncertain whether the Board may any longer be treated merely as "an extension of the machinery for settling disputes on the property of the carriers" or whether it has become a full-fledged administrative agency with adjudicatory functions.⁴⁷ On this question the carrier and labor members of the Board apparently disagree, the labor members taking the position that the Board "never was intended to function as a court of equity, but rather that it should operate as a continuation of the conference room method employed upon the various properties."⁴⁸

⁴⁷ See Attorney General's Committee on Administrative Procedure, Monograph No. 17, pp. 8-10, *Compilation*, p. 230-231; *id.*, Final Report, p. 185.

⁴⁸ *Ibid.*

This difference in analysis is not academic. It cuts across various facets of the Board's procedure and operations and is inevitably reflected in the problem now before this Court. For as a result of the view that the present Board, like its predecessors, is an adjustment, and not an adjudicatory, body representing the organizations whose members compose it, the labor members of the Board have declined to permit the Board to hear cases not submitted by the union representing the majority of the craft involved.⁴⁹

On this point, the study prepared by the staff of the Attorney General's Committee on Administrative Procedure declares:⁵⁰

Assertions of claims. The agreements entered into by the majority unions with the carriers are regarded by the unions as peculiarly theirs, although they apply not only to the employees of the carrier who are members of the union, but to the non-members as well. In some four hundred cases since the establishment of the Board individuals have

⁴⁹ The exclusive statutory authority of the majority to represent the entire collective bargaining unit in negotiating agreements does not extend to the presentation of individual grievances. Sections 2, Fourth, and 3, First (j). Cf. *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515, 548, 557. The National Labor Relations Act, which was modeled on the Railway Labor Act (*National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 266-267) so provides in express language (Section 9 (a), 49 Stat. 449, 29 U. S. C., Sec. 159).

⁵⁰ Monograph No. 17, *supra*, pp. 15, 16, *Compilation*, pp. 233-234.

sought to assert claims before the Board. With the exception of a few isolated cases of Division IV involving claims of individuals where there was no organization of the particular craft or class on the property, no case asserted by an individual has ever been decided on the merits by the Board. The only way that an individual may prevail is by taking his case to the union and causing the union to carry it through to the Board.

The Board does not affirmatively take the position that claims of individuals may not be asserted before it. The labor members solidly vote in each instance not to consider claims asserted by individuals, while the carrier representatives consistently vote to consider them, even though they are claims asserted against the railroads, basing their position upon "the constitutional right of the individual." Whatever the reason may be, each division of the Board deadlocks on the question whether or not to consider individuals' claims, and since this question has never been resolved by the appointment of a referee, it is simply stalemated.⁵¹ Hence, no affirmative action is taken and no awards are made.¹⁵

¹⁵ The secretary of Division I says that he has been instructed that he is not to inform individuals

⁵¹ Only after the Attorney General's opinion of February 19, 1940, were referees appointed to break deadlocks on jurisdictional questions (See Opinions of Attorney General, Vol. 39, No. 113; Attorney General's Committee on Administrative Procedure, Monograph No. 17, p. 24, *Compilation*, p. 238.)

who seek to petition the Board that the Board will not consider claims asserted by individuals. He therefore uses his ingenuity in explaining reasons for rejecting cases, and is forced to write many equivocal letters. If a party or his representative comes into the offices of the Board, however, the secretary tells him orally and confidentially the reason for refusing to docket the case.

Since the issuance of the report, the Second Division of the Board, sitting with a referee, has formally held that it lacked jurisdiction to hear cases brought by an individual, on the ground that the provision in the Act that "disputes shall be handled in the usual manner" before the carrier required that grievances be taken up through the union committee, even when the union was allegedly discriminating against the particular employee because of his failure to pay dues. See *Gooch v. Ogden Union Railway, N. R. A. B.*, 2nd Div., Award No. 514.

Under these circumstances it might not unreasonably be assumed, that the unions representing the majority in a craft would naturally be less anxious to bring before the Board the individual grievances of non-members or members not in good standing than those of their members.⁵² In this

⁵² We do not mean to suggest that the labor organizations never bring the cases of non-members before the Board. They are more likely to do so, however, when the case involves a general principle applicable as a precedent to all in the craft than when it involves a seniority or discharge question limited in effect to the individual, or when the position of the individual nonmember is frequently adverse to members of the organization. See *e. g.*, *Ledford v. Chicago, M., St. Paul & P. R. Co.*, 298 Ill. App. 298, 18 N. E. (2d) 568.

connection it should be noted that certain groups of employees, such as Negroes, are ineligible for membership in many of the railway labor organizations.⁵³

Whether or not the refusal of the Board to hear cases not filed by the labor organization is in conformity with the statute,⁵⁴ it must be reckoned with here as a fact. The consequences of a ruling that the creation of the Adjustment Board ousted the courts of jurisdiction would, at least under current practice, be to leave remediless individual employees or groups of employees whom for any rea-

⁵³ *Louisville Lodge, No. 10, Association of Colored Railroad Trainmen v. National Railroad Adjustment Board, First Division* (N. D. Ill., No. 45687), decided February 8, 1937, 1940, is a case in which a labor organization of Negroes complained that the Board would not hear its complaint as to discrimination against colored employees. The case was dismissed on the grounds that the United States District Court lacked jurisdiction to issue a writ of mandamus. See William H. Spencer, *The National Railroad Adjustment Board*, *supra*, p. 40, reprinted in *Compilation*, Appendix, p. 190.

⁵⁴ Two circuit courts of appeals have indicated that they disagree with the view that individuals have no right to appear before the Board, except through the labor organizations. *Nord v. Griffin*, 86 F. (2d) 481 (C. C. A. 7th), certiorari denied, 300 U. S. 673; *Estes v. Union Terminal Company*, 89 F. (2d) 768 (C. C. A. 5th). The statute declares that the Board shall hear "disputes between an employee or group of employees and a carrier or carriers" (Section 3, First (i)), that "Parties may be heard either *in person*, by counsel, or by other representatives, as they may respectively elect" (Section 3, First (j)), that notice of hearing shall be

son the labor organizations do not undertake to represent. It would be unlikely that such a person could afford to or would care to seek by mandatory injunction or mandamus to compel the Board, composed of the employee representatives who had originally refused to permit the case to be submitted and the representatives of the carrier whom he was opposing, to hear his case.

It is quite clear that, in the absence of a specific contractual limitation, individual employees and minority groups were previously able to protect their rights in court, regardless of the attitude of

given "to the *employee* or employees and the carrier or carriers involved" (*ibid.*), and that "*any person* for whose benefit" an award is made may sue on the award in a United States District Court (Section 3, First (p)). The language of the Act differs considerably, of course, from that of the earlier agreements, which expressly provided that cases could be submitted to the Adjustment Boards only with the consent of the chief officers of the signatory labor organizations, see pp. 18-23, *supra*. Mr. George M. Harrison, president of the Brotherhood of Railway and Steamship Clerks, who appeared in support of the 1934 Act on behalf of all the railway labor organizations, testified before the House Committee on Interstate and Foreign Commerce (Hearings on H. R. 7650, 73d Cong., 2d Sess., p. 83) as follows:

* * * a question developed about whether or no an individual or a minority of individuals, collectively concerned in grievances would have the right under this Bill to have their grievances passed upon by the board.
* * * in connection with disputes to be decided by adjustment boards, it is clear that an employee may in person or by counsel of his own choosing, or other representation, take care of his individual grievances.

So, it cannot be said then that an employee will be unable to get consideration of his grievances just be-

the majority organization, and that Congress did not intend the Railway Labor Act to abolish these rights.⁵⁵ The refusal of the labor members of the present Board to hear cases not filed by the organizations in effect imposes upon the Board the limitation contained in the older agreements (but not in the present statute) that cases could only be submitted by the chief officer of the labor organizations signatory to the agreement. Thus the practice of the Board in refusing to hear such cases is hardly compatible with the theory that its jurisdiction is exclusive.

SUMMARY AND RECOMMENDATION

The above review of those factors which must be considered in construing the Railway Labor Act

cause he does not happen to be a member of the group representing the majority, because this bill is not designed to prevent the adjustment of grievance cases. The bill is designed to bring that very thing about.

See, also, William H. Spencer, *The National Railroad Adjustment Board* (University of Chicago Press, 1938), p. 39, *Compilation*, Appendix, p. 189, where the author concludes that, "It would seem that the phraseology of the Railway Labor Act authorizes an individual employee to petition the Adjustment Board for relief."

⁵⁵ See notes 6, 44-46, 54, *supra*. Inasmuch as the ability to protect his contract rights may be a matter of economic life and death to an employee, it would not be unlikely that to construe the Act as giving exclusive control over such matters to the labor organizations representing the majority could be used by the unions as a method of forcing all employees into such organizations. This would not be in harmony with the statutory prohibition against a closed shop (Section 2, Fifth) which was deliberately adopted by Congress after considerable opposition (78 Cong. Rec. 12390-12393, 12402).

leads to conclusions which may be summarized as follows:

1. The language and legislative history of the Act are inconclusive as to whether or not resort to the Adjustment Board is to be required before the institution of proceedings in court.

2. The cases may be said to hold or assume that the jurisdiction of the Board is not exclusive.

3. A comparison of the Act with the earlier statutes and also with the original agreements establishing adjustment boards, both of which used mandatory language, leads to possible conflicting inferences, depending upon whether it is assumed that the slight difference in the phraseology of the Act was deliberately directed at the present problem or that the present adjustment board was to have the same jurisdiction as its predecessors.

4. Insofar as the purposes of the Act are concerned, it is probable that the existence of a single experienced body interpreting railway labor agreements in a uniform manner is conducive to harmony and to a decrease in the number of such disputes. And yet it cannot be said with any assurance that the availability of the ordinary judicial remedy for breach of contract would be likely to bring on industrial strife.

5. The practice of the Board in refusing to hear cases not submitted by the representative of the majority of a craft is not consistent with the notion that the Board has exclusive jurisdiction of the type of cases which come before it.

We believe that in view of all of the above considerations, the generally accepted principles of statutory construction do not compel the Court to reach either conclusion as to the exclusive jurisdiction of the Adjustment Board. In the absence of an adequate guide to the actual intention of Congress on this point, we think the controlling consideration should be the effect of the proposed interpretation upon the attainment of the objectives of the Railway Labor Act.

Even on this issue there is room for difference of opinion. The primary purpose of the Railway Labor Act is the settlement of disputes peacefully without interruption to transportation. Since judicial proceedings are a peaceful means of resolving disputes, the possibility of resort to the courts is not inconsistent with this basic objective. On the other hand, the uniform interpretation of such agreements by a single expert tribunal would eliminate the possibility of discrimination between men working on different parts of the same road or on different roads, and thus remove one cause of dissatisfaction and controversy.⁵⁶ Furthermore, com-

⁵⁶ See Lloyd K. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L. J. 567 (*Compilation*, Appendix, pp. 110-135). The cases which come before the Board arise out of numerous technical rules with "intricate" interpretations. Attorney General's Committee on Administrative Procedure, Monograph No. 17, pp. 5-6, *Compilation*, p. 229; Garrison, *supra*, pp.

pulsory use of the machinery established by the statute will, except for those cases which go to referees, in substance result in the settlement of cases by agreement between the carriers and the unions. We believe that such a solution of a dispute is probably more consistent with harmonious labor relations than the peaceful but compulsory acceptance of judicial decisions.

We would have been inclined to argue more vigorously in support of this view if it were not for its possible injustice as applied to individuals whose cases the Board refuses to hear under its present practice. We think it clear that Congress did not intend the machinery established in the Railway Labor Act to deprive any individual or group of all means of protecting the rights granted under collective labor agreements.

A possible solution of this problem would be to permit court action by individuals who cannot, without the use of some mandatory process, bring their case before the Adjustment Board.⁵⁷ An employee who is not a member of the organization which presents such cases should not be required to do more

586-591 (*Compilation*, Appendix, 125-129). A definite advantage is to be derived from having such cases decided by persons familiar with the subject and its terminology, and not by persons having "no practical experience of railroad-ing." Garrison, *supra*, p. 593 (*Compilation*, Appendix, p. 131).

⁵⁷ Injunctive relief was granted an individual employee under such circumstances in *Ledford v. Chicago, M., St. Paul & P. R. Co.*, 298 Ill. App. 298, 306, 18 N. E. (2d) 568.

than show that the union has declined to present his case.⁵⁸ Since the filing of proceedings with the Board by the individual would under such circumstances be futile, and since the Board generally does not issue a formal ruling declining jurisdiction,⁵⁹ to require a refusal by the Board itself would merely serve to exhaust the period of limitations in which a person would be able to sue in court.⁶⁰

The history of the present case indicates that the petitioner probably is not a member of or in good standing with the officials of the labor organization representing his craft. (See R. 134, 165-167, 181-184.) He had previously attacked the fairness of its seniority roster and been expelled from the union for failure to pay dues. Thus, although it does not appear whether or not the organization was requested to take his case, he might not unreasonably

⁵⁸ This might not be necessary or advisable as to members, since they might be deemed to have agreed to permit all disputes to be handled through the officers of their organizations.

⁵⁹ See p. 33, *supra*.

⁶⁰ These factors, we believe, make inapplicable the principle that a person cannot complain that an administrative remedy is inadequate until he has tried it. See, e. g., *Lehon v. City of Atlanta*, 242 U. S. 53. An administrative remedy must be "adequate" (cf. *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 41); an "idle ceremony" will not be required. *Long v. Van Osedale*, 26 N. E. (2d) 69, 74, and cases cited, *supra*, note 46, p. 30. Just as long-continued refusal to act in a particular case warrants disregard of an administrative remedy (*Smith v. Illinois Bell Tel. Co.*, 270 U. S. 587), so should an admitted long-continued refusal to hear a certain class of cases.

have assumed, without asking, that it would have refused to have done so.⁶¹

In view of the uncertain state of the law as to the necessity of going before the Adjustment Board rather than suing in court, we do not believe that petitioner should be prejudiced by any failure to anticipate what this Court may now decide. If the Court should hold that the Adjustment Board has primary jurisdiction, except as to those cases which the Board declines to handle, we suggest that the Court not order that petitioner's complaint in this case be finally dismissed, but only that the judgment of the District Court be stayed, pending a request by petitioner that the union present his case, if necessary, to the higher operating officials of the carrier and then, if the matter has not been adjusted in good faith within a reasonable time, to the Board. Cf. *Tank Car Corp. v. Terminal Co.*, 308 U. S. 422. If his case is then submitted to the Board the further action of the Board should be

⁶¹ The record shows that petitioner presented his seniority complaint to a "Labor Board" in 1931, but that after seven years he had still heard nothing as to its disposition (R. 127, 134, 138). Since there was no known body of that name at that time, it is difficult to determine what "Labor Board" is meant, but we believe that the reference is probably to the Train Service Adjustment Board for the Western Region, to which the Illinois Central belonged. See *Compilation*, Appendix, p. 46. Although we have been advised that the records of that Board were transferred to the First Division of the National Railroad Adjustment Board in 1934, that Division has informed us that it is unable to find petitioner's complaint in its files.

awaited.⁶² But if the union will not present petitioner's case to the Board, the District Court should then be permitted to enforce its judgment.

Respectfully submitted.

FRANCIS BIDDLE,

Solicitor General.

ROBERT L. STERN,

Special Assistant to the Attorney General.

MARCH 1941.

⁶² Petitioner's case would come before the First Division of the Adjustment Board, which has jurisdiction over yardmen. We think that the Court's attention should be called to the fact that this Division is now more than "three years behind in its docket" and "constantly falling further behind." (Attorney General's Committee on Administrative Procedure, Monograph No. 17, p. 36, *Compilation*, p. 244.)

BLANK PAGE

SUPREME COURT OF THE UNITED STATES.

No. 550.—OCTOBER TERM, 1940.

Earl Moore, Petitioner,	} On Writ of Certiorari to the	
vs.		United States Circuit Court
Illinois Central Railroad Company.		of Appeals for the Fifth Circuit.

[March 31, 1941.]

Mr. Justice BLACK delivered the opinion of the Court.

We granted certiorari in this case, 311 U. S. —, to review a judgment in which the Circuit Court of Appeals applied a Mississippi statute of limitations contrary to the Mississippi Supreme Court's application of the same statute to the same plea in the same case. Compare *Moore v. Illinois Central Railroad Co.*, 180 Miss. 277, with *Illinois Central Railroad Co. v. Moore*, 112 F. (2d) 959.

Petitioner Moore, a member of the Brotherhood of Railroad Trainmen, brought suit for damages against respondent railroad company in a Mississippi state court, claiming that he had been wrongfully discharged contrary to the terms of a contract between the Trainmen and the railroad, a copy of the contract being attached to the complaint as an exhibit. Petitioner alleged that as a member of the Trainmen he was entitled to all the benefits of the contract. Judgment on the pleadings was rendered against Moore by the trial court. Upon appeal the Mississippi Supreme Court reversed and remanded. One of the railroad's pleas was that the contract of employment between Moore and the railroad was verbal, rather than written, and that any action thereon was therefore barred by the three year statute of limitations provided by Section 2299 of the Mississippi Code of 1930. With reference to this plea the Mississippi Supreme Court said: "The appellant's suit is not on a verbal contract between him and the appellee, but on a written contract made with the appellee, for appellant's benefit, by the Brotherhood of Railroad Trainmen; consequently, section 2299, Code of 1930, has no application, and the time within which appellant could sue

is six years under section 2292, Code of 1930." *Moore v. Illinois Central Railroad Co.*, *supra*, 291.

After the remand by the Mississippi Supreme Court, Moore amended his bill to ask damages in excess of \$3000, and the railroad removed the case to the federal courts. The District Court, considering itself bound by state law, held that the Mississippi three year statute of limitations did not apply,¹ but on this point the Circuit Court of Appeals reversed,² declining to follow the Mississippi Supreme Court's ruling. Calling attention to the fact that the Mississippi Supreme Court does not regard itself as bound by a decision upon a second appeal, the Circuit Court of Appeals (one judge dissenting) said: "Since the removal of the case to the federal court this court stands in the place of the Supreme Court of Mississippi and with the same power of reconsideration." But the Circuit Courts of Appeals do not have the same power to reconsider interpretations of state law by state courts as do the highest courts of the state in which a decision has been rendered. The Mississippi Supreme Court had the power to reconsider and overrule its former interpretation, but the court below did not. And in the absence of a change by the Mississippi legislature, the court below could reconsider and depart from the ruling of the highest court of Mississippi on Mississippi's statute of limitations only to the extent, if any, that examination of the later opinions of the Mississippi Supreme Court showed that it had changed its earlier interpretation of the effect of the Mississippi statute. *Wichita Royalty Co. v. City National Bank*, 306 U. S. 103, 107; cf. *West v. American Telephone & Telegraph Co.*, No. 44 this Term; *Fidelity Union Trust Co. v. Field*, No. 32 this Term. But the court below did not rely upon any change brought about by the Mississippi legislature or the Mississippi Supreme Court. On the contrary, it concluded that it should reexamine the law because there was involved the interpretation and application of a collective contract of an interstate railroad with its employees. The court below also based its failure to follow the Mississippi Supreme Court's decision in Moore's case on the ground that in an earlier case the Mississippi Supreme Court had said that the three year statute applied unless a contract was "wholly provable in writing," a situation which the court below

¹ 24 F. Supp. 731.

² 112 F. (2d) 959.

did not think existed here.³ But even before the decision in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, the federal courts applied state statutes of limitations in accordance with the interpretations given to such statutes by the states' highest courts. As early as 1893, this Court said: "The construction given to a statute [of limitations] of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications."⁴ It was error for the court below to depart from the Mississippi Supreme Court's interpretation of the state statute of limitations.

But respondent says that there is another reason why the judgment in its favor should be sustained.⁵ This reason, according to respondent, is that both the District Court and the Circuit Court of Appeals erred in failing to hold that Moore's suit was prematurely brought because of his failure to exhaust the administrative remedies granted him by the Railway Labor Act, 44 Stat. 577, as amended, 48 Stat. 1185, 45 U. S. C. § 151, *et seq.* But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. In support of its contention, the railroad points especially to section 153(i), which, as amended in 1934, provides that disputes growing out of grievances or out of the interpretation or application of agreements "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." And in connection with this statutory language the railroad also directs our attention to a provision in the agreement between the Trainmen and the railroad--

³ *City of Hattiesburg v. Cobb Bros. Construction Co.*, 174 Miss. 20.

⁴ *Bauserman v. Blount*, 147 U. S. 647, 654, quoting from *Leffingwell v. Warren*, 2 Black 599, 603. And see *Balkam v. Woodstock Iron Co.*, 154 U. S. 177, 187.

⁵ Cf. *Helvering v. Gowran*, 302 U. S. 238.

a provision authorizing Moore to submit his complaint to officials of the railroad, offer witnesses before them, appeal to higher officers of the company in case the decision should be unsatisfactory, and obtain reinstatement and pay for time lost if officials of the railroad should find that his suspension or dismissal was unjust. It is to be noted that the section pointed out, § 153(i), as amended in 1934, provides no more than that disputes "may be referred . . . to the . . . Adjustment Board" It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577-578) had, before the 1934 amendment, provided that "upon failure of the parties to reach an adjustment a "dispute shall be referred to the designated Adjustment Board by the parties, or by either party" This difference in language, substituting "may" for "shall", was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature.⁶ The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge. But for failure to follow state law on the state statute of limitations, the judgment of the Circuit Court of Appeals is reversed; the judgment of the District Court is affirmed.

It is so ordered.

Mr. Justice FRANKFURTER concurs in the result.

⁶ See, e. g., H. Rep. No. 328, 69th Cong., 1st Sess., p. 4.

END